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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1078

THE BORDEN COMPANY, A NEW JERSEY CORPORATION,
Petitioner,

vs.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, UNITED STATES OF AMERICA, S. R. SMITH, ADMINISTRATOR, AGRICULTURAL MARKETING SERVICES, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA, AND G. R. GRANGE, DEPUTY ADMINISTRATOR, AGRICULTURAL MARKETING SERVICES, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Respondents,

and

CAMPBELL SOUP COMPANY, A NEW JERSEY CORPORATION,
Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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THE DARNELL-WILSON PRINTING COMPANY, CHICAGO

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Respondents,

and

CAMPBELL SOUP COMPANY, A NEW JERSEY CORPORATION,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Borden Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 29, 1966.

OPINIONS BELOW.

The opinion of the District Court granting the respondent's motion for summary judgment (R. 660)* is reported in 256 F. Supp. 592 and is set forth in Appendix D hereto, *infra*, p. 25a. The District Court's earlier (and unreported) opinion granting petitioner's motion for preliminary injunction (R. 634) is set forth in Appendix C hereto, *infra*, p. 22a. The opinion of the Court of Appeals, which has not yet been reported, is set forth in Appendix F hereto, *infra*, p. 45a.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 29, 1966 (Appendix G hereto, *infra*, p. 46a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

At issue is the validity of certain regulations issued by the Department of Agriculture (USDA) under the Poultry Products Inspection Act. Under these regulations, petitioner would be categorically prohibited, on pain of criminal prosecution, from continuing to label its soup products with tradenames which have been used for over 25 years without a single consumer complaint and which had been specifically approved by USDA.

The questions presented are:

1. Whether USDA had the statutory power to promulgate the challenged regulations:

(a) Whether, under this Court's decision in *Houston*

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* "(R. . . . .)" refers to pages in the Joint Appendix filed in the Court of Appeals for the Third Circuit and transmitted to this Court as provided in Rule 21 of the Rules of this Court.

v. *St. Louis Packing Co.*, 249 U. S. 479 (1919), USDA may categorically "deem" a class of labels to be false and deceptive and prohibit their further use without proof that consumers "would be deceived" by the prohibited labels.

(b) Whether USDA, despite the absence of any comparable statutory delegation, has power equivalent to the power specifically granted by Congress to the Food and Drug Administration to establish "quasi-legislative standards of identity" without proof that the prohibited labels are false and deceptive.

(c) Whether USDA has power under the Poultry Products Inspection Act to allocate jurisdiction over a product, as between itself and the Food and Drug Administration, on the basis of the tradename used on the product.

2. Whether due process of law as well as the Administrative Procedure Act were violated:

(a) By USDA's reliance on evidence which USDA refused to disclose on the ground that it was "confidential".

(b) By the denial of any hearing—either at the administrative level or on judicial review—at which petitioner would have an opportunity to rebut such "confidential" evidence.

(c) By the similar denial of any hearing on petitioner's contention and offer to prove that, although the rule-making function had been formally delegated to the Deputy Administrator, he did not exercise any independent judgment in promulgating the challenged amendments but instead was merely carrying out directions of his superiors having nothing to do with consumer deception.

(d) By the limiting of judicial review to an "administrative record" which had been tailored by the agency to omit highly relevant documents (and parts of documents) which are directly opposed to the agency position.

3. Whether the Courts below erred in sustaining the challenged regulations on a wholly different basis than the grounds articulated by the agency itself.

STATUTES INVOLVED.

The statutes principally involved are the Poultry Products Inspection Act, 21 U. S. C. § 451 et seq. (1964), and the Administrative Procedure Act, 5 U. S. C. § 1001 et seq. (1964). Pertinent provisions of these statutes are set forth in Appendix A, *infra,* p. 1a.

STATEMENT.

This action was brought by the petitioner to obtain a declaratory judgment declaring invalid certain amendments to regulations of the United States Department of Agriculture (USDA) under the Poultry Products Inspection Act (PPIA).

These amendments (which are set forth in Appendix B, *infra,* p. 4a) purport to establish standards of identity for (*inter alia*) dehydrated poultry soup mixes. Under these standards, tradenames such as "chicken noodle soup mix" are categorically "deemed" to be false and deceptive, and therefore prohibited, if the tradenames are used on products containing less than specified percentages of chicken meat (App. 17a-20a).* The amendments further provide that such a product, which is otherwise exempt from the PPIA, shall be denied an exemption if it is labeled with a tradename "deemed" to be false and deceptive (App. 19a-20a).

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* The abbreviation "App." as used herein refers to the appendices to this petition, *infra.*

The Wyler Products and the Dehydrated Soup Mix Industry.

Petitioner produces and markets two dehydrated poultry soup mixes—"Wyler's Chicken Noodle Soup Mix" and "Wyler's Chicken Rice Soup Mix". These products have been sold under substantially the same names, and have been processed according to formulae which have remained substantially constant, for over 25 and 15 years respectively (R. 234-237).

Throughout this lengthy period, these products have received ever-increasing popular acceptance (R. 239, 304), and no consumer has ever complained—either to petitioner, its predecessor company* or to USDA—that the names of the products are in any way false or deceptive (R. 158, 197, 237). Furthermore, in 1959, after the PPIA became effective, USDA approved the labels as *not* false and deceptive (R. 25, 26, 137, 140, 217); and this approval continued in full force until March 1, 1963, when the products were exempted by USDA (R. 138).**

Nevertheless, although these products are made from and contain powdered chicken meat (as well as chicken fat), they would fail to qualify under the challenged regulations, which would require a minimum of 2% chicken meat on a ready-to-serve basis (i.e., after the housewife has added a quart of water to the 2-ounce package) in order for petitioner to continue use of its traditional tradenames. Stated in terms of dry weight, the regulations would require a minimum of *33% chicken meat* in each package.*** Unless

* Wyler & Company was acquired by petitioner in 1961.

** When the products became exempt as a result of a change of regulations, defendant Grange advised Wyler that the new regulations "do not imply either approval or disapproval by this agency of the kind name of any exempted product" (R. 510).

*** For institutional packages of the same product, a lesser requirement—*i. e.*, 15% of dry weight—is imposed (App. 20a).

the chicken meat content of these products were increased to that level, petitioner's tradenames would be "deemed" to be false and deceptive (App. 17a) and continued use of the trade-names would subject petitioner to criminal prosecution under Sections 9(d) and 12(a) of the PPIA (App. 2a).

Furthermore, if the chicken meat content of these products were increased to that level, it would result in an unmarketable soup having a muddy appearance and the consistency of gruel, unless the additional chicken meat were in the form of non-soluble chunks (R. 236, 324). It was not until 1961, after petitioner's products had been marketed for approximately 20 years with wide consumer acceptance, that it first became *technologically possible* (with the development of the freeze-drying method) to produce a dehydrated chicken soup mix containing non-soluble chunks of chicken meat (R. 324, 327-328).

Thus, prior to 1961 *every* dehydrated chicken soup mix on the market would have been in violation of the challenged regulations. Even today approximately *two-thirds* of all such mixes (in terms of sales volume) do not contain non-soluble chunks of chicken meat and would fail to qualify (R. 312).*

The Administrative Proceeding.

The challenged amendments were proposed and principally championed by intervenor Campbell Soup Company, which (despite its dominant position in the canned soup market) complained that it was "in a disadvantageous competitive position" because of the tradenames used by

* Both USDA (App. 9a) and the District Court (App. 42a) stated that 90% of all "poultry soups" contain the requisite amount of meat, but this figure is admittedly achieved only by combining sales of canned soups (of which Campbell has 80-90% of the total) with sales of dehydrated mixes and treating them as interchangeable, notwithstanding their fundamental differences in technology (R. 321-323), marketing (R. 273-275), and name (R. 211).

petitioner and other manufacturers of dehydrated soup mixes.* After an informal administrative hearing, the amendments were promulgated by respondent Grange, Deputy Administrator of USDA's Agricultural Marketing Services (App. 21a).

In announcing USDA's intention to promulgate the amendment to Section 81.134, respondent Grange stated that USDA was relying on, among other things, evidence of "consumer expectation and acceptability of these products as established over the years and to comments received from various interested persons . . ." (R. 54). Prior to the USDA hearing, petitioner requested USDA to disclose this evidence "so as to make the administrative procedure more meaningful" (R. 75) and "in the interest of a full and fair hearing" (R. 81). In response, respondent Grange stated that "It is anticipated that *all pertinent information will be developed at the hearing,*" and that

* On April 8, 1963, USDA circulated a notice proposing an amendment to Section 81.134 which would establish labeling standards for many poultry food products *but not for soups or dehydrated soup mixes* (R. 519). However, on August 6, 1963, Campbell wrote to respondent Grange urging that soups and dehydrated soup mixes be included in the amendment (R. 525). Two days later, on August 8, Campbell representatives conferred with Grange and other USDA personnel concerning the matter (R. 537). On August 15, and again on September 27, Senator Fulbright (in whose state Campbell has a large plant, R. 627) wrote to Secretary Freeman supporting the Campbell proposal (R. 625, 627). On September 4, 1963, Campbell again wrote to Grange (with a carbon copy to Senator Fulbright) reiterating its complaint that it is "in a disadvantageous competitive position" and asserting that the proposed amendment should be adopted promptly and without compliance with ordinary rule-making procedures (R. 536). On September 10, 1963, "by special messenger" Campbell sent a package of "Wyler's Chicken Noodle Soup Mix" to USDA "because of your current interest" in the proposal (R. 528).

Campbell's efforts produced quick results. On October 15, 1963, respondent Grange issued a new notice (R. 53) proposing that the amendment to Section 81.134 be modified in substantially the same terms as urged by Campbell in its letter of August 6, 1963 (R. 525). On February 10, 1964, USDA published Campbell's related proposal to amend Section 81.208, the exemption provision (R. 76).

"The Department is not in position *prior to the hearing* to furnish to particular interested persons information which it may have concerning the proposed labeling standards." (R. 82, emphasis added.)

At the USDA hearing, relying on the assurances given by Grange "that all pertinent information will be developed at the hearing," petitioner again requested disclosure of the evidence on which USDA relied in support of the amendments. Plaintiff's request, however, was denied on the ground that such information was "confidential" (R. 370-372).

Accordingly, USDA offered no evidence at the hearing to support the amendments except for the testimony of Hermon Miller, the Director of USDA's Poultry Division. With respect to the labeling standard, Mr. Miller acknowledged that no surveys had been taken and that *"we picked this figure out of the air. . . ."* (R. 202, 205). Mr. Miller likewise testified on deposition that *it "was pretty arbitrary"* (R. 114); that *USDA did not "have any concrete evidence" that the labels are false and deceptive* (R. 125-126); that *"false and deceptive* is something we are not positive on because that *is something that is not tested"* (R. 126); and that *"I don't know that I could say that it is deceptive to the consumer. . . ."* (R. 116.) (Emphasis added.)

The other witnesses at the USDA hearing who supported the regulations did so for a variety of reasons—for example, to eliminate alleged unfair competition between canned soup manufacturers and dehydrated soup manufacturers, and to increase the consumption of poultry. But *none testified that the labels were false and deceptive;* and in fact two of the *proponents* of the amendments (including Campbell's witness) *denied* that labels prohibited by the regulations were deceptive (R. 232, 392-393). Not a single consumer or "consumer oriented group" even bothered to make an appearance at the hearing (R. 129).

Nevertheless, in promulgating the regulations, respondent Grange found that the challenged requirements are "necessary to prevent sale of the product under a false or deceptive name or other false or deceptive labeling" (App. 12a, 7a) and are "supported by substantial evidence as to consumer expectancy . . ." (App. 8a). In this connection, USDA placed heavy reliance on the "written comments" which USDA had refused to disclose at the hearing on the ground that they were "confidential" (App. 7a, 8a).

Proceedings in the Courts Below.

Shortly after issuance of the amendments, the present action was commenced in the United States District Court for the District of New Jersey.* The Court, "taking the probability of irreparable damage to plaintiff-movant, the apparent lack of any harm to government or consumer brought about by a delay, and the substantiality of plaintiff's claim," granted plaintiff's motion for preliminary injunction (App. 24a).

Thereafter Campbell was permitted to intervene in support of the challenged amendments.

Petitioner requested a hearing at which it would have the opportunity to meet the allegedly "confidential" evidence which USDA had refused to disclose but which USDA had relied upon in promulgating the challenged amendments. Petitioner also requested an opportunity to show at such a hearing that the entire administrative proceeding had been pre-judged and that respondent Grange in promulgating the regulations—although he had ostensibly been delegated the rule-making function—was merely carrying out his superiors' directions having nothing to do with consumer deception. Petitioner also objected to the limit-

* Jurisdiction of the District Court was invoked under 28 U. S. C. §§ 1331 and 1337 (1964).

ing of judicial review to the so-called "administrative record" on the ground that it had been tailored by USDA to exclude highly relevant documents (and parts of documents) which were directly opposed to USDA's position.

Each of petitioner's requests and objections was denied. No trial of any kind was held in the District Court. Petitioner was given no opportunity to rebut USDA's "confidential" evidence and likewise was given no opportunity to show that respondent Grange in promulgating the regulations had merely carried out his superiors' directions. Limiting its review to the "administrative record" filed by USDA, and despite the numerous factual issues presented, the Court (Lane, J.) granted respondents' motion for summary judgment (App. 25a).

On the jurisdictional issue, the Court sustained the regulations on the ground that "the Secretary has a general legislative power concerning matters covered by the Poultry Act" (App. 33a). The Court did not dispute the fact that "there are no record proofs that the labels on the Wyler's soups, or any others, affected by the regulations are 'false, deceptive or misleading' ", but nevertheless accepted the respondents' contention that "the Secretary of Agriculture does have the power to establish standards of identity by regulation" even without any "determination that the labels in issue are in fact false, deceptive and misleading" (App. 30a-31a).

On this basis, the Court found it unnecessary to determine whether there was adequate evidentiary support for USDA's findings that the regulations were "necessary to prevent sale of the product under a false or deceptive name" and "supported by substantial evidence as to consumer expectancy". Instead, according to the Court, the only question was whether "the evidence in the record *supporting* the adoption of the regulations as promulgated is sufficient to

refute the contention that the Secretary acted arbitrarily, capriciously, or in abuse of his discretion . . ." in concluding that a standard of identity was desirable (App. 40a, emphasis added). In resolving that question, the Court (App. 41a-42a) relied heavily on the written comments which USDA had refused to disclose on the ground they were "confidential."

On December 29, 1966, the Court of Appeals *per curiam* directed that the District Court's judgment "will be affirmed on the well-reasoned opinion of Judge Lane" (App. 45a).

REASONS FOR GRANTING THE WRIT.

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. Houston v. St. Louis Packing Co., 249 U. S. 479 (1919).

The Courts below held that USDA possesses "general legislative power" to promulgate "such general quasi-legislative standards of identity for poultry products as are set forth in § 81.134", and that it is therefore unnecessary to make or review any "determination that the labels in issue are in fact false, deceptive and misleading". As authority for this extraordinary holding, the Courts below relied solely on *Houston* v. *St. Louis Packing Co.*, 249 U. S. 479 (1919). But examination of the *Houston* decision readily demonstrates that such an analysis is patently erroneous and that the decision below is in direct conflict with *Houston.*

1. In *Houston,* in complete contrast to the present case:

(a) the Secretary of Agriculture made a specific finding that the "sausage" label involved there "is false and deceptive" (p. 482) and "resulted in deception of purchasers and consumers" (p. 483);

(b) this Court stated that the question on review was "whether he [the Secretary] acted in good faith and upon substantial grounds" in making that finding (p. 483); and

(c) the regulation in *Houston* was sustained by this Court only after a detailed review of the proof of deception and upon a determination that the Secretary's finding of deception was supported by substantial evidence (p. 486).

The Court in *Houston* stated (p. 484):

> "Whether or not the term 'sausage,' when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive, is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act, and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, *where it is fairly drrived at with substantial evidence to support it.*" (Emphasis added.)

In this case, the District Court's opinion—adopted by the Court below—quoted and relied on this very passage from *Houston*. But—rather remarkably—it deleted the whole second clause and made no mention whatsoever of the italicized proviso (App. 32a).

In *Houston*, this Court further stated (pp. 486-487):

> "The result, thus stated, of the examination of the record before us, shows beyond controversy that the Secretary of Agriculture, in promulgating the regulations complained of, acted on *substantial evidence* and with sufficient reason in concluding that persons purchasing or using as 'sausage' the appellee's compound of various meats, cereal, and water *would be deceived* as to its composition and as to its value as a food product. . . ." (Emphasis added.)

Thus, in order to sustain a regulation of this type, the *Houston* decision unequivocally requires a showing of substantial evidence that consumers "would be deceived" by the labels in question. *Houston* also shows the basic fallacy of the decision below (App. 33a) that USDA may "deem" a label to be false and deceptive, merely by USDA's own fiat, and without any proof that the label is false and deceptive.

2. It is true that the Food and Drug Administration (FDA) has the power to establish general standards of identity without proof of consumer deception. *But that power was conferred on the FDA by express statutory delegation* (21 U. S. C. §§ 341, 343). The PPIA, however, contains no comparable provision, thus quite clearly demonstrating that Congress did not intend that USDA have an equivalent power. On the contrary, the only authority which USDA has in this area is, by virtue of Section 8(b) of the PPIA (App. 1a), to prohibit the use of labels which are false and deceptive.

Moreover, not even the FDA has the kind of untrammeled and unreviewable power which the Courts below attributed to USDA. Although the FDA has a vastly greater responsibility than USDA with respect to food content and labeling, and although the FDA—unlike USDA—is expressly authorized to promulgate standards of identity for food products by rule-making proceedings, FDA orders establishing such standards must be "based only on substantial evidence of record" at a hearing held in conformity with express statutory requirements (21 U. S. C. § 371(e)). See *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 221 (1943).

Although Section 8(b) of the PPIA does *not* contain a grant of authority in any way comparable to the authority conferred on the FDA, it does specifically provide a quasi-judicial procedure to be followed by USDA in preventing false and deceptive labeling. Under this procedure, if the Secretary has reason to believe that a particular label is false and deceptive, the administrative determination of whether it is false and deceptive is to be made after an adversary trial-type hearing, and of course is subject to full judicial review. Yet, according to the decision below this whole statutory scheme—and all the procedural safeguards specifically imposed by Congress—may be circum

vented by the simple device of promulgating regulations which purportedly "have the force and effect of law" (R. 631, 632) and which categorically prohibit a whole class of labels without any proof of consumer deception and under pain of criminal prosecution.

B. United States ex rel. Accardi v. Shaughnessy, 347 U. S. 260 (1954).

The decision below is also in conflict with this Court's decision in *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954).

In *Accardi,* this Court established the principle that a subordinate administrative official who has been delegated discretionary authority "must exercise his authority according to his own understanding and conscience" and that it is a violation of due process for a department head —after delegating such authority by published rule—to dictate the decision of the subordinate official (p. 267). In *Accardi,* this Court also held that a party alleging that the subordinate official had failed to exercise his own independent judgment, and that the challenged decision had been dictated by his superior despite the delegation, is entitled to prove his allegations before a reviewing court (p. 268). See also *Service* v. *Dulles,* 354 U. S. 363 (1957).

The pertinent facts in this case are precisely comparable to those in *Accardi.* The regulations challenged here were promulgated by respondent Grange, the Deputy Administrator of Agricultural Services, who had ostensibly been delegated the authority to promulgate such regulations by the Secretary of Agriculture.* As a consequence, under

* For the initial delegation by the Secretary of Agriculture, see 22 F. R. 7108 (Aug. 30, 1957), amending 19 F. R. 74 (Jan. 5, 1954). For the subdelegation of this authority to the Deputy Administrator, see 28 F. R. 496, 498 (Jan. 17, 1963) and 29 F. R. 3114 (Mar. 5, 1964).

Accardi, respondent Grange was obliged to "exercise his authority according to his own understanding and conscience" and the Secretary was similarly obliged to avoid dictating the decision in any manner.

In the Courts below, petitioner contended and offered to prove that the challenged regulations were not the product of the Deputy Administrator's independent judgment based on the record before him, but were promulgated by him without regard to the record because he was directed to do so by his superiors for reasons having nothing to do with consumer deception. In the circumstances—including Campbell's sponsorship of the amendments and USDA's apparent concession that the Secretary *did* make the decision*—the refusal of the Courts below even to afford petitioner a hearing on its allegations was clearly in conflict with this Court's decision in *Accardi.*

C. S. E. C. v. Chenery Corp., 332 U. S. 194 (1947), reaffirmed in Burlington Truck Lines, Inc. v. United States, 371 U. S. 156 (1962), and N. L. R. B. v. Metropolitan Life Ins. Co., 380 U. S. 438 (1965).

The challenged amendment to the labeling regulation is explicitly based on a specific finding in the regulation itself that "The requirements of this section are hereby found to be necessary for this purpose"—*i.e.,* "to prevent sale of the product under a false or deceptive name. . . ." (App. 12a). In addition, the accompanying Statement of Considerations not only repeats the same finding but

* In the Court below, the respondents sought to justify USDA's deletion from the "administrative record" of certain documents—including documents prepared by respondent Grange—on the basis of "the Secretary's conclusion that the administrative record . . . could not properly include letters written by his subordinates which were not part of the evidence before him. . . ." (Supplemental brief of appellees, p. 3). Respondent Grange is, of course, one of "his subordinates."

further finds that the labeling requirement "is supported by substantial evidence as to consumer expectancy. . . ." (App. 7a, 8a).

Yet the decision below upholds the validity of the regulation on the ground that these factual findings are, in effect, immaterial because of USDA's alleged "general legislative power" to promulgate "general, quasi-legislative standards of identity for poultry products" without proof that the prohibited labels are false and deceptive. The decision below is thus in direct conflict with this Court's decision in *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947), holding that the propriety of agency action must be judged "solely by the grounds invoked by the agency," and that "if those grounds are inadequate or improper, the court is powerless to affirm the administrative action. . . ."

This holding was recently reaffirmed in *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156 (1962), and *N. L. R. B.* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965). In *Burlington*, this Court stated (pp. 168-169):

> "The courts may not accept appellate counsel's post hoc rationalizations for agency action; *Chenery* requires than an agency's discretionary order be upheld, if at all, *on the same basis articulated in the order by the agency itself.*" (Emphasis added.)

As the Court pointed out in *Metropolitan* (p. 444), this is required by "the integrity of the administrative process", and "For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review".

Under these decisions, USDA having based its action on a finding that the regulation is necessary to prevent consumer deception and "is supported by substantial evidence as to consumer expectancy", the regulation can be sustained—if at all—only on that ground. By seeking to

sustain the regulation on a wholly different basis, the decision below is in direct conflict with those decisions.

II. THE DECISION BELOW PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL PROCEDURE, INVOLVING BOTH THE CONSTITUTION AND THE ADMINISTRATIVE PROCEDURE ACT, WHICH SHOULD BE DETERMINED BY THIS COURT.

In *Houston,* this Court recognized that a regulation of the type challenged by this action could be sustained only if the requisite finding as to deception "is fairly arrived at" (249 U. S. at 484). Similarly, but in greater detail, this Court declared in *Greene* v. *McElroy,* 360 U. S. 474, 496-497 (1959), speaking through Chief Justice Warren:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, *and the reasonableness of the action depends on fact findings,* the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. * * * We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. * * * This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * *but also in all types of cases where administrative and regulatory actions were under scrutiny.*" (Citing, e.g., *Morgan* v. *United States,* 304 U. S. 1 (1938), emphasis added.)

In the *Morgan* case (*supra*), the action of the Secretary of Agriculture in fixing the maximum rates to be charged by market agencies at stockyards was challenged. The proceeding was concededly one "looking to legislative action" (298 U. S. at 479). Nevertheless, USDA "was found by the Court to have made determinations in the nature of adjudications affecting legal rights" (*Hannah* v. *Larche,*

363 U. S. 420, 451 (1960)) and accordingly the Secretary's action was set aside "for his failure to conduct a trial-like hearing" (*ibid.*).

In the instant case, as Chief Justice Hughes stated in *Morgan*:

> "The [USDA] answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. *It has regard to the mere form of the proceeding and ignores realities.*" (304 U. S. at 20, emphasis added.)

The regulations challenged in this case are more clearly particular and adjudicatory in nature than the USDA "legislative" action in *Morgan*. This is true, not only in terms of the purpose of the proceeding and the small number of persons who are the target of the proceeding, but also because the regulations purport to constitute a determination that the tradenames of those persons are false and deceptive.

"This determination has consequences that are serious to the condemned organizations." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 175 (1951) (concurring opinion of Douglas, J.). Particularly is this so in view of USDA's position that the regulations "have the force and effect of law" (R. 631, 632) and that violation of the challenged labeling standard would expose petitioner to the peril of criminal penalties.

A. USDA's Reliance on "Confidential" Evidence.

The "requirements of confrontation and cross-examination" reaffirmed in *Greene* v. *McElroy, supra,* were given short shrift by USDA in this proceeding. USDA purported to give petitioner a "hearing" but converted it into a meaningless gesture by refusing, on the ground that it

was "confidential", to disclose the evidence on which it relied in issuing the amendments.* Petitioner was thereby deprived of an opportunity to meet and impeach the "confidential" evidence and to confront and cross-examine those who offered such evidence.

As Mr. Justice Frankfurter pointed out in the *Joint Anti-Fascist* case, *supra*, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of a serious loss notice of the case against him and opportunity to meet it." (341 U. S. at 170, 171-172, concurring.)

B. Denial of Any Hearing on Judicial Review to Meet USDA's "Confidential" Evidence.

USDA's refusal to afford a meaningful "hearing" to meet the "confidential" evidence might well have been cured if the petitioner had been given such an opportunity on judicial review. See, e.g., *Jordan* v. *American Eagle Fire Ins. Co.*, 169 F. 2d 281, 289 (D. C. Cir. 1948).

But instead the Courts below compounded the violation of due process by denying any hearing at all and by similarly placing heavy reliance on the "confidential" evidence (App. 41a-42a). By contrast, "an elaborate trial on the merits" was held in the *Houston* case (249 U. S. at 482).**

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* The inadequacy of the so-called "hearing" is further demonstrated by the fact that the witnesses were not sworn and were not under any obligation to answer questions (R. 171-172).

** See also *Armour & Co.* v. *Freeman*, 304 F. 2d 404, 406, 409, 412 (D. C. Cir. 1962), where the Court recognized that a trial was necessary and proper in determining the validity of a similar USDA regulation.

Furthermore, as already pointed out (*supra*, pp. 15-16), the Courts below refused petitioner any hearing on its offer to prove that the decision ostensibly made by respondent Grange had actually been dictated by his superiors in direct violation of the principle established by this Court in the *Accardi* case.

C. The Tailored "Administrative Record".

The denial of any hearing on judicial review is particularly objectionable because of the nature of the "administrative record" to which the Courts below restricted their review.

Section 10(e) of the Administrative Procedure Act provides that "In making the foregoing determinations the court shall review the *whole* record. . . ." (Emphasis added.) But it is abundantly clear that the "administrative record" filed by USDA did not constitute "the *whole* record." On the contrary, apart from the transcript of the USDA "hearing", the "administrative record" consists of an arbitrary selection of documents from the USDA file, and was carefully tailored to *exclude* dozens of highly relevant documents (and even parts of documents) which are directly opposed to USDA's position.

Two examples will demonstrate the point:

1. In issuing the challenged regulations, respondent Grange referred to the military specifications then in effect for a dehydrated chicken soup mix and stated that "The Department is informed that the proper name used in the specifications for the product is 'Soup, Dehydrated, Chicken Flavored'" (App. 9a). The only part of the specifications which USDA chose to include in the "administrative record" was the *cover page*, which includes the title "Soup, Dehydrated, Chicken Flavored" (R. 517). But USDA chose to *omit* from the "administrative record" the rest of

these specifications, which *affirmatively required* that the product be labeled "Soup, Dehydrated, Chicken"—a name which would *violate* the challenged regulations.

2. USDA's "Statement of Considerations" places great reliance on the "formulae which are on file" with USDA (App. 7, 8). The inference, of course, is that these "formulae which are on file" constitute a cross-section of the formulae of all dehydrated chicken soup mixes, and that USDA thus considered the whole industry in drawing the line at the percentage required by the regulations. However, the truth is that the only "formulae which are on file" were *formulae for the minority of mixes which already meet the challenged standard.* This vital fact is revealed in a USDA document which USDA withheld from the "administrative record."*

Despite these examples and many others of a similar nature, the Courts below declined to go beyond the documents selected by USDA, and thus even the "record" certified to this Court does not contain the omitted documents.

To permit an agency to "pick and choose" the evidence by which the agency's action is to be judged not only violates the Administrative Procedure Act and minimal standards of fairness** but furthermore is inconsistent with the basic premise of judicial review.

Even when considered separately, but in particular when considered cumulatively, the procedures employed in this case—USDA's reliance on "confidential" evidence; the

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* In a letter dated February 14, 1964, from Frank Blood, Deputy Director of the Poultry Division, to Arnold Mayer, one of the witnesses at the hearing held the following month, Mr. Blood stated: "On your request for exact proportions of the contents of dehydrated soup mixes, *we no longer have the formulae on file because such products are exempt*"—*i. e.*, products accounting for approximately *two-thirds* of the market.

** See, *e.g.*, *Northeast Airlines, Inc.* v. *C. A. B.*, 345 F. 2d 484, 486 (1st Cir. 1965).

Courts' denial of any opportunity to rebut the "confidential" evidence or to offer proof on the *Accardi* issue; and the tailored "administrative record"—present at the very least a substantial question warranting review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

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APPENDIX A.

PRINCIPAL STATUTORY PROVISIONS INVOLVED.

Section 8(b) of the PPIA, 21 U. S. C. § 457(b), provides as follows:

> "The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this chapter shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 194 of Title 7 shall be applicable to appeals taken under this section."

Section 9(d) of the PPIA, 21 U. S. C. § 458(d), provides as follows:

> "The following acts or the causing thereof are prohibited:
>
> * * * * *
>
> "(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product."

Section 12(a) of the PPIA, 21 U. S. C. § 461(a) provides as follows:

> "Any person who violates the provisions of section 458, 459, 460, or 466 of this title, shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than six months, or a fine of not more than $3,000, or both such imprisonment and fine; but if such violation is committed after one conviction of such person under this section has become final such person shall be subject to imprisonment for not more than one year, or a fine of not more than $5,000, or both such imprisonment and fine; but if such violation is committed after two or more convictions of such person under this section have become final such person shall be subject to imprisonment for not more than two years, or a fine of not more than $10,000, or both such imprisonment and fine. When construing or enforcing the provisions of said sections the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association within the scope of his employment or office shall in every case be deemed the act, omission or failure of such individual, partnership, corporation, or association, as well as of such person."

Section 14 of the PPIA, 21 U. S. C. § 463, provides as follows:

> "The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this chapter."

Section 18(a) of the PPIA, 21 U. S. C. § 467(a) provides as follows:

> "(a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this chapter shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this chapter."

Section 10(e)(B) of the Administrative Procedure Act, 5 U. S. C. § 1009, provides as follows:

> ". . . the reviewing court shall . . .
>
> (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

APPENDIX B.

THE CHALLENGED AMENDMENTS TO USDA REGULATIONS.

Title 7—AGRICULTURE.

Chapter I—Agricultural Marketing Service (Standards, Inspections, Marketing Practices), Department of Agriculture.

Subchapter D—REGULATIONS UNDER THE POULTRY PRODUCTS INSPECTION ACT.

PART 81—INSPECTION OF POULTRY AND POULTRY PRODUCTS. Minimum Poultry Meat Content Standards and Exemptions.

Under authority contained in the Poultry Products Inspection Act, as amended (21 U. S. C. 451 et seq.), the Agricultural Marketing Service hereby amends §§ 81.1, 81.6, 81.134, and 81.208 of the regulations governing the inspection of poultry and poultry products (7 CFR, as amended, 81.1, 81.6, 81.134, and 81.208) as set forth below.

Statement of considerations. The amendments establish minimum poultry meat content standards and similar standards for labeling purposes for numerous poultry food products, and, under specified conditions, exempt from definition as poultry products under the Act, certain human food products which contain small amounts of poultry. The amendments also revoke the present exemptions from the definition of "poultry product" for certain foods which contain more than minimal amounts of poultry and in lieu thereof except the preparation of such articles from the

definition of "processing" operations required to be conducted under Federal inspection unless otherwise exempted.

Tentative proposed standards for minimum poultry meat content for various poultry food products were circulated among members of the poultry processing industry in April 1963. Similar proposed standards for these and additional poultry products, including poultry soup, were published in proposed amendments of § 81.134 of the regulations in a notice of rule making in the FEDERAL REGISTER of October 15, 1963 (28 F. R. 11017). On February 29, 1964, there were published in the FEDERAL REGISTER (29 F. R. 2892) alternative proposals to amend § 81.208(a) of the regulations relating to the exemption of certain consumer packaged human food products which contain poultry. The most controversial matter involved in the proposed amendments was the proposal to require that consumer packaged poultry soup products contain at least two percent poultry meat when ready to serve if they are to bear the unqualified kind name of the poultry in the product name. This matter was the subject of an oral public hearing held in Washington, D. C., on March 23-25, 1964, pursuant to notices published in the FEDERAL REGISTER (28 F. R. 14432; 29 F. R. 530). At the hearing, consideration was also given to the proposed amendments of § 81.208(a).

Consideration has been given to all data, views and arguments presented at the hearing or in writing pursuant to the notice of rule making and to all other relevant information available in the Department of Agriculture. As would be expected, representatives of the varying economic interests presented sharply opposed data, views and arguments. Most of the information presented was useful in establishing the facts and the Department is appreciative to those who submitted such information, particularly the consumer oriented groups.

The amendments now adopted modify the entire § 81.208 of the regulations by limiting the present exemptions from the definition of "poultry product" to specified articles containing minimal amounts of poultry ingredients and by imposing specified labeling requirements for such exemptions. The amendments continue the present requirement that the poultry ingredients used in the exempted articles have been inspected under the Act or an equivalent foreign inspection system. Under the amendments it will be the responsibility of the Secretary of Agriculture to determine whether any particular article complies with the labeling and other requirements which are conditions of the exemptions, and any article which does not in his judgment comply with the conditions would be, ab initio, a poultry product subject to the inspection, labeling, record keeping and other provisions of the Poultry Products Inspection Act. That Act would have no further application to any such exempted product while it qualifies for exemption under § 81.208, and such a product would be subject to regulation under the Federal Food, Drug and Cosmetic Act (21 U. S. C. 301 et seq.), e.g., as to adulteration and factory inspection.

The amendments of §§ 81.1, 81.6, and 81.208 of the regulations except the preparation of poultry sandwiches, poultry fat capsules, and certain poultry food products prepared by caterers or restaurants, from the definition of "processing" operations required to be conducted under Federal inspection under the Poultry Products Inspection Act unless otherwise exempted. The inspection requirement is relieved only if the poultry or poultry products used in such articles have been inspected under the Act or an equivalent foreign inspection system. As poultry products, the excepted articles would be within the applicable provisions of sections 9 and 11 through 18 of the Poultry Products Inspection Act, including the prohibitions of sec-

tion 9 of the Act against the use in commerce of false or misleading labels on poultry products or false representations as to inspection, and including the record requirements of section 11 of the Act. Such articles would be deemed to be eligible for distribution in commerce under the provisions of subsection 9(a) of the Act. Such articles would be subject to regulations under the Federal Food, Drug and Cosmetic Act to the extent that the Poultry Products Inspection Act is not made applicable, e.g., as to adulteration, factory inspection, and required labeling information.

The amendment of § 81.134 establishes minimum poultry meat content standards and similar standards for numerous poultry products. These standards are necessary to prevent the sale of such products under false or deceptive names or other false or misleading labeling and will be used in evaluating labeling of products for purposes of determining their compliance with the Act, not only in the case of products fully regulated under the Act but also in the case of products exempted from inspection under amended §§ 81.1 and 81.6 and in connection with determining whether a product qualifies for a conditional exemption under amended § 81.208.

Formulae are required to be filed with the Department in connection with the procedure for approving labels prior to their use for poultry products under the Poultry Products Inspection Act or for other products containing poultry, inspected under the voluntary program pursuant to the Agricultural Marketing Act of 1946. The Department in establishing the standards, gave consideration to these formulae, to written comments received with respect to the tentative proposed standards and the published proposed standards, and to all other information and data available to it, including that submitted at the oral hearing on March 23-25, 1964. The standards are substantially

the same as those proposed in October 1963, and any changes from the proposal are made pursuant to comments received or in order to state more clearly the requirements and intentions of the Department. Some labeling requirements proposed as a part of § 81.208, which relates to exemptions, have been relocated to § 81.134.

The amendments establish a two percent minimum poultry meat content standard for consumer packaged soup, if it is to bear unqualified kind name in the product name, e.g., "Chicken Noodle Soup." This is supported by substantial evidence as to consumer expectancy presented at the hearing or contained in the written comments submitted or otherwise available to the Department including the previously mentioned formulae which are on file. These comments and testimony came from consumers or consumer oriented groups, representatives of the poultry industry and poultry associations, soup manufacturers, and other interested persons. The large majority of each of these groups favored the establishment of the two percent standard, considered all types of soups to be in the same product class, and supported the labeling provisions of the proposals.

The amendments treat all types of soups—liquid, condensed or dehydrated—as being in the same product class and, therefore, apply the same labeling standards to all types of consumer packaged soup. The proposed amendments of October 15, 1963 did likewise. The Department believes that the form in which a product may be merchandised (i.e., liquid, frozen, or dehydrated) does not affect the end use which may be made of the product by the consumer and, accordingly, should not affect the required minimum poultry meat content of such products when ready-to-serve. Liquid, condensed, and frozen soups bearing the unqualified kind name (chicken, turkey, etc.) in the product name contain two percent or more poultry

meat computed on a ready-to-serve basis. According to testimony presented at the hearing, approximately one-third of the dehydrated soups containing the unqualified kind name in the product name contains two percent or more poultry meat in the ready-to-serve form, and these categories (liquid, frozen, condensed, and one-third of the dehydrated soups) represent in excess of 90 percent of the poultry soups which consumers buy. Therefore, it is reasonable to conclude that this two percent level of poultry meat on a ready-to-serve basis is an acceptable level for a product bearing the unqualified kind name of the poultry in the product name. It is also reasonable to conclude that the labeling of a product containing less poultry meat is deceptive or misleading when the product name is the same as that used on products containing two percent or more poultry meat.

The information offered in opposition to the amendments has been carefully reviewed, and for various reasons has been found inadequate to warrant a decision to abandon or materially change the amendments. For example, reference was made in testimony at the hearing to certain home cookbook recipes for chicken soup as showing that chicken meat was not an ingredient in ready-to-serve chicken soup. However, many cookbooks contain specific recipes for poultry soup which require considerable amounts of chicken in the product when ready-to-serve. There is some question as to whether recipes for home prepared meals serve as a useful guide in establishing standards for similar commercially prepared products.

Mention was made at the hearing of United States military specifications allegedly describing, as "dehydrated chicken soup," a product containing less than two percent chicken meat on a ready-to-serve basis. The Department is informed that the proper name used in the specifications for the product is "Soup, Dehydrated, Chicken Flavored."

The result of certain surveys were presented at the hearing purporting to show that consumers do not expect "chicken soup" to contain chicken meat. The survey procedures used to raise questions as to whether the survey results, in fact, furnished any indication of consumer expectation. The results of one survey were not too helpful in arriving at a decision because consumers were asked to describe the product they purchased but were not asked about what they expected or whether they were satisfied. Another survey consisted of a taste panel test given to a selected group of women who were served a product containing less than two percent chicken meat and asked to identify or name it. Although the Department does not consider that this survey necessarily reflects consumer expectation, if it were to be considered as such, the results support the two percent standard. Roughly, one-fourth (27 percent) of the taste panel members did not identify or name, as "chicken soup," the product served to them. The other 73 percent identified the product as "chicken soup" but the survey did not establish that these panel members found the product acceptable for sale under a "chicken soup" label, and, therefore, did not show that as to them such a label for the product would not be deceptive or misleading. It is reasonable to believe that such labeling would have been misleading to the 27 percent of the panel members who could not even identify the product as "chicken soup."

While the majority of all soup manufacturers were in agreement with the proposed amendments, the majority of the dehydrated soup manufacturers were opposed. They contended that dehydrated soups labeled as poultry soups need not contain two percent or more poultry meat in the ready-to-serve form because such products have been merchandised over a period of years. However, this period began prior to the enactment of the consumer oriented

Poultry Products Inspection Act. The fact that a product has achieved consumer acceptance does not necessarily mean that it does not have misleading labeling. (See *United States* v. *254 Cases of* * * * *Tomato Sauce,* 63 F. Supp. 916.) The amendments will allow these firms to continue to merchandise products which contain less than the specified percent of poultry meat, provided the product is labeled to distinguish it from the standard article and provided it meets the other specified requirements.

The amendments are as follows:

1. Section 81.1 is amended by adding in alphabetical order the following definition:

§ 81.1. Definitions.

* * * * *

Process; Prepare. Process (or prepare), used as a verb, means to conduct any operation or combination of operations, whereby poultry is eviscerated, cut-up, heat treated, canned, packed, labeled, or changed in size, shape, or form, and includes the combining of poultry products with other ingredients, excepting, however, the preparation of sandwiches or fat capsules from domestic or imported poultry or poultry products inspected in accordance with this part, and the preparation, from such poultry or poultry products, of any food product by any caterer or restaurant for serving by such caterer or restaurant directly to consumers, and the packing or labeling of such articles in the course of the excepted operations. The term "process" (or "prepare") does not refer to freezing of poultry or poultry products, except when freezing is incidental to operations otherwise classed as "processing" under this paragraph, in which case the provisions of §§ 81.50 and 81.104 and other applicable provisions of this part shall apply. Other forms of the verb "process" or "prepare" shall be construed accordingly.

* * * * *

2. Section 81.6 is amended to read:

§ 81.6. Establishments requiring inspection.

Every establishment in which poultry is slaughtered for transportation or sale in commerce or for transportation from an official establishment to another official establishment, and every establishment in which poultry products are processed for transportation or sale in commerce shall have inspection under the regulations in this part, except as expressly exempted in this part.

3. Section 81.134 is amended to read:

§ 81.134. Product specifications for labeling purposes.

(a) *Authorization to establish specifications.* The Administrator is authorized to establish specifications covering the principal constituents of any poultry food product with respect to which a specified name of the product or other labeling terminology may be used, whenever such action is necessary to prevent sale of the product under a false or deceptive name or other false or misleading labeling. The requirements of this section are hereby found to be necessary for this purpose.

(b) *Labeling terminology for light and dark chicken or turkey meat.* Product containing light and dark chicken or turkey meat in quantities other than natural proportions, as indicated in Table I, must have a qualifying statement in close conjunction with the name of the product indicating, as shown in Table I of this paragraph, the types of meat actually used, except that when the product contains less than 10 percent cooked deboned poultry meat or is processed in a manner that the character of the light and dark meat is not distinguishable, the qualifying statement will not be required. The qualifying statement must be in type at least one-half the size and of equal boldness as the name of the product; e.g., Boned Turkey (Dark Meat). If

a product contains light and dark meat in natural proportions and bears a label referring to light or dark meat content, the label shall include a qualifying statement in accordance with this paragraph.

Table I.

Terminology	Percent light meat	Percent dark meat
Natural proportions	50-65	50-35.
Light or white meat	100	0.
Dark meat	0	100.
Light and dark meat	51-65	49-35.
Dark and light meat	35-49	65-51.
Mostly white meat	66 or more	34 or less.
Mostly dark meat	34 or less	66 or more.

(c) *Poultry meat content of poultry food products*—(1) *General.* (i) Where cooked poultry meat is specified in this section as an ingredient of poultry food products, this means poultry meat derived from poultry processed, cooked and cooled in a manner approved by the Administrator without use of liquid or moisture in direct contact with the poultry meat following the cooking and cooling of the poultry.

(ii) If, following cooking and cooling of poultry meat to be used in poultry food products, liquid or moisture is used in direct contact with such poultry meat and the percentage of solids, excluding salt, in the poultry meat is found to be below 34 percent when such poultry meat is tested by approved methods, the percentage of poultry meat required by this section for any poultry food product shall be increased in proportion to the deficiency, or the meat shall be so processed as to raise the solids content, excluding salt, to 34 percent. The official plant shall furnish adequate facilities for such testing.

(2) *Canned boned poultry.* (i) Canned boned poultry shall, unless otherwise specified in this subparagraph (2), be prepared from cooked deboned poultry meat and may contain skin and fat not in excess of natural proportions. Gelatin, stabilizers or similar solidifying or emulsifying agents shall not be added to product labeled "Boned (Kind) —Solid Pack," but may be added in quantities not in excess of a total of 0.5 percent of the total ingredients in the preparation of other canned boned poultry products and in such case the common name of the substance added shall be included in the name of the product, e.g., "Boned Chicken with Broth—Gelatin Added."

(ii) Canned boned poultry, except poultry within subdivision (iv) of this subparagraph, shall meet the requirements set forth in Table II of this paragraph. The percentages in Table II shall be calculated on the basis of the total ingredients used in the preparation of the product.

(iii) Canned shredded poultry (Shredded (Kind)) consists of poultry meat from the back, wings, and neck, separately or in combination, and shall be prepared as set forth in Table II, items 1, 2, 3 or 4, whichever is applicable. In addition, poultry meat from other parts may be used: Skin and fat not in excess of natural proportions of the parts used may be included.

(iv) Canned boned poultry with natural juices (Boned (Kind) with natural juices) shall be prepared from either raw boned poultry meat or a mixture of raw boned poultry meat and cooked boned poultry meat, and shall have no liquid added during the preparation of the product.

Table II

Product name	Minimum percent cooked deboned poultry meat of kind indicated, with skin, fat, and seasoning	Maximum percent liquid that may be added[1]
1. Boned (Kind)—Solid Pack	95	5
2. Boned (Kind	90	10
3. Boned (Kind) with Broth[2]	30	20
4. Boned (Kind) with percent Broth[2, 3]	50	50
5. Strained or Chopped (Kind) with Broth[2, 4]	43	57

1. Liquid may be in the form of, but is not limited to broth or extractives.

2. Alternatively, product may be prepared from raw boned poultry meat in combination with cooked boned poultry meat so long as the product complies with the specified standard.

3. Total amount of liquid added shall be included in the name of the product; e. g., "Boned Chicken with 25 percent Broth."

4. Label must indicate in some manner that product is for infant or geriatric servings.

(3) *Poultry dinners (frozen) and pies.* Poultry dinners (frozen) and pies shall meet the requirements set forth in Table III of this paragraph and the percentage or weight shall be calculated on the basis of total ingredients used in the preparation of the products.

Table III

Product name	Minimum cooked deboned poultry meat of kind indicated			Minimum raw deboned poultry meat of kind indicated		
	Percent		Weight	Percent		Weight
(Kind) Pies	14	or	1⅛ oz. per 8-oz. pie	25	or	2 oz. per 8-oz. pie
(Kind) Dinners	[1, 2] 18		[2] 2 oz. pie			

(4) *Poultry rolls.* (i) Binding agents, including but not limited to gelatin and wheat gluten, may be added in quantities not in excess of a total of 3 percent for cooked rolls and 2 percent for raw rolls, based on the total ingredients used in the preparation of the product, without affecting the name of the product. However, when such agents are added in excess of 3 percent or 2 percent, whichever is applicable, the common name of the agent or the term "Binders Added" shall be included in the name of the product; e.g., "Turkey Roll—Gelatin Added."

(ii) With respect to heat processed rolls, 2 percent or less liquid based on the weight of the finished product without liquid may remain with or be returned to product labeled as "(Kind) Roll."

1. Excluding weight of appetizers, desserts, etc.

2. 18 percent or 2 ounces, whichever is greater. A minimum of 45 percent, or 5 ounces per dinner, whichever is greater, of cooked poultry including bone and breading may be used in lieu of minimum 18 percent or 2 ounces of cooked deboned poultry meat and the cooked poultry including bone and breading shall not contain more than 30 percent breadings.

(iii) Heat processed rolls which have more than 2 percent liquid remaining with or returned to the product shall be labeled as "(Kind) Roll with Natural Juices." If any liquid other than natural cookout juices is added, the products must be labeled to indicate that fact; e.g., "Turkey Roll with Broth." Liquid shall not be returned or added to product within this subdivision (iii) in excess of the amount normally cooked out during preparation.

(5) (*Kind*)—*burgers.* Such product shall consist of 100 percent poultry meat of the kind indicated, with skin and fat not in excess of natural proportions. Product containing fillers or binders shall be named "(Kind) Patties."

(6) *Other poultry dishes and sperialty items.* (i) Poultry dishes and specialty items listed in Table IV of this paragraph shall meet the requirements set forth in said Table, irrespective of the type of packaging, and the percentages in Table IV shall be calculated on a ready-to-serve basis, except that soup bases in institutional packs which are prepared for sale to institutional users shall have a minimum of 15 percent cooked deboned poultry meat based on the weight of the soup base product. Products similar to those listed in Table IV, but having less than the specified minimum poultry meat content, may use the "Kind" name in the product name, provided it is appropriately qualified to distinguish such products from those containing the specified minimum meat content.

(ii) Products of the types specified in §§ 81.208 (a) and (b) will be deemed to have false, deceptive or misleading labeling if they use the "Kind" name of the poultry (chicken, turkey, etc. in the product name without appropriate qualification. For example, a consumer packaged noodle soup product containing less than 2 percent chicken meat on a ready-to-serve basis may not be labeled as "Chicken Noodle Soup" but, when appropriate, could be labeled as "Chicken Flavored Noodle Soup."

Table IV

Product name[1]	Minimum percent cooked deboned poultry meat of kind indicated	Minimum percent cooked poultry of kind indicated, including bone
(Kind) Ravioli	2	
(Kind) Soup	2	
Chop Suey with (Kind)	2	
(Kind) Chop Suey	4	
(Kind) Chow Mein without noodles	4	
(Kind) Tamales	6	
Noodles or Dumplings with (Kind)[2]	6	
(Kind) Stew	12	
(Kind) Fricassee of Wings		40
(Kind) Noodles or Dumplings[2]	15	30
Creamed (Kind)	20	
(Kind) Cacciatore	20	40
(Kind) Fricassee	20	40
(Kind) A-La-King	20	
Sliced (Kind) with Gravy	35	
Minced (Kind) Barbecue	40	

4. Section 81.208 is amended to read:

§ 81.208. Exception from definition of "poultry product" of certain human food products containing poultry.

Section 4(e) of the Poultry Products Inspection Act (21 U. S. C. 453 (e)) defines the term "poultry product" to include any human food product consisting of any edible part of poultry separately or in combination with other ingredients, unless such human food product is exempted by the Secretary from such definition. It has been determined that the effectuation of the purposes of the Act does not require the full application of the requirements of the Act

1. The product name may contain other appropriate descriptive terms such as "noodle"; e.g., "Chicken Noodle Soup".

2. Product also includes rice or similar starches.

and the regulations to the following human food products which consist in part of edible parts of poultry. This determination is based upon the fact that such products contain an extremely small percentage of poultry and consist principally of non-poultry ingredients. Therefore, the Poultry Products Inspection Act and the regulations thereunder shall be applicable to the following products only to the extent of requiring that they comply, in the judgment of the Secretary, with the conditions specified below and said products, if they so comply with such conditions, are

§ 81.208. Execption from definition of "poultry product" exempted from the definition of "poultry product" and the application of said Act and the regulations:[1]

(a) Any human food product (in a consumer package) not provided for in paragraph (c) of this section, if: (1) It contains less than 2 percent cooked poultry meat (deboned white or dark poultry meat, or both); (2) it contains less than ten percent of cooked poultry skins, giblets, or fat, separately, and less than ten percent of cooked poultry skins, giblets, fat, and meat (deboned white or dark poultry meat or both) in any combination; (3) the poultry ingredients used in the product were prepared under inspection as defined in § 81.1, or were inspected under a substantially equivalent foreign inspection system and imported in compliance with the Act and the regulations; (4) the immediate container of the product bears a label which shows the name of the product, a statement of the ingredients in the product, including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measures of the contents, and the name and address of the person preparing or distributing the product; and (5) the product does not in any re-

1. The Federal Food, Drug, and Cosmetic Act (21 U. S. C. 301 et seg.) is applicable to all such exempted products to the extent that the Poultry Products Inspection Act is not made applicable thereto.

spect have a false or misleading label. (See § 81.134 with respect to labeling.) The aforesaid percentages of ingredients shall be computed on the basis of the moist, deboned, cooked poultry in the ready-to-serve product when prepared according to the serving directions on the consumer package.

(b) Any human food product (in an institutional pack), not provided for in paragraphs (c) of this section, if: (1) It is prepared for sale only to institutional users, such as hotels, restaurants, and boarding houses, for use as a soup base or flavoring; (2) it contains less than 15 percent cooked poultry meat (deboned white or dark poultry meat, or both), computed on the basis of the moist, deboned, cooked poultry meat in such product; and (3) it complies with the provisions of paragraph (a) (3), (4) and (5) of this section in all respects.

(c) Bouillon cubes, poultry broths, gravies, sauces, seasonings, and flavoring if: (1) They contain poultry meat or poultry fat only in condimental quantities; and (2) they comply with the provisions of paragraph (a) (3), (4) and (5) of this section in all respects.

(Sec. 14, 71 Stat. 447, 21 U. S. C. 463; 19 F. R. 74, as amended.)

The amendments of the provisions of §§ 81.134 and 81.208(a) of the regulations have been the subject of extensive public rule making procedures, involving submission of comments by interested persons both at an oral hearing and in writing. The information developed in the rule making procedures disclosed a need not only to amend these provisions but also to make related changes in the provisions of §§ 81.1, 81.6 and 81.208 (b) and (c). It appears that such information affords a sound basis on which to determine the action to be taken concerning the latter provisions and that further public rule making pro-

cedure is not necessary to inform the Department as to the views of affected persons.

Changes made in the amendments of §§ 81.134 and 81.208(a) from the proposed amendments of these provisions are not substantive but are for purposes of clarification.

Further public rule making procedure would delay issuance of the final amendments in this matter and such delay would prolong uncertainty and be detrimental to the affected industry and the public. Therefore, in accordance with section 4 of the Administrative Procedure Act (5 U. S. C. 1003), it is found upon good cause that further public rule making procedure with respect to the amendments is impracticable and unnecessary.

The foregoing amendments shall become effective January 1, 1965. This will afford persons a reasonable opportunity to obtain supplies of new labels or to revise formulations, if necessary, prior to January 1, 1965.

Done at Washington, D. C., this 1st day of July 1964.

G. R. Grange,
Deputy Administrator, Marketing Services.

[F. R. Doc. 64-6728; Filed, July 6, 1964; 8:50 a.m.]

APPENDIX C.

OPINION OF THE DISTRICT COURT GRANTING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION.

(December 7, 1964.)

The Court: Plaintiff, The Borden Company, seeks a preliminary injunction pursuant to Federal Rule 65 which would restrain the United States Secretary of Agriculture, defendant, from enforcing against plaintiff certain amendments to Sections 81.134 and 81.208 of the regulations under the Poultry Products Inspection Act pending final disposition of this action. These amendments, respectively, would deem poultry products containing less than 2% chicken meat on a ready-to-serve basis mislabeled if they make unqalified use of the "kind" name (e.g. chicken or turkey) in the product name, and would withdraw exemption of less-than-2% poultry products from the Inspection Act where mislabeling, as defined above, is found. This latter regulation would then place exclusive jurisdiction over the products in question in the Department of Agriculture as per Scetion 18(a) of the above Act.

The general purpose of a preliminary injunction is to preserve the *status quo* until a final determination of the action upon full hearing. 7 Moore's Section 65.04(1).

Thus,

> "When a motion for preliminary injunction is presented to a court in advance of hearing on the merits, it is called upon to exercise its discretion 'upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the

probability of the ultimate success or failure of the suit, the balance of damage and convenience generally. . . .' " *Perry* v. *Perry,* 190 F. 2d 601, 602.

and,

". . . On issuing a preliminary injunction, the court, except in very rare instances, must always consider the balance of resultant injury to the parties, and in many cases to the public, and where the right is one in the exercise of which the public has a vital interest . . . the court may refuse a preliminary injunction, when, if the matter concerned only the parties to the suit, it would grant it." *Cook Brewing Co.* v. *Garber,* 168 Fed. 942. Based upon the above standards and the record now before it—including the argument just heard—this Court can make the following findings and conclusions which it feels are dispositive of the motion herein presented.

(1) Compliance with the regulations in issue would compel plaintiff's subsidiary, Wyler, either to change the nature of its soup products by adding freeze-dry chunks of chicken meat, or to change its trade name. Regarding the first alternative, there is evidence that such a process could result in less appetizing fare without any appreciable increase in nutritional value. Plaintiff has further estimated that retail costs to the consumer would at the least be doubled from the present $.10 per packet. As to the second alternative, injury to goodwill seems an inevitable by-product of any brand-name change. While actually remaining identical in content, a soup of lesser quality and value than the subject product would be connoted by the label qualifications prescribed by the proposed regulations. Plaintiff has further noted, referring to the Washington Hearing on this matter, that some two-thirds of all such soup mixes (in terms of sales volume) are affected by these regulations. (See Affidavit of Walter R. Neisser, President of Wyler & Co. dated November 23, 1964, and Plaintiff's memo in support of this motion.)

2. Presumably, in this matter the interests of the defendant, Secretary Freeman and the United States

Department of Agriculture, are founded in protection of the consumer public. Such is the general nature of the Poultry Products Inspection Act under which the contested regulations were promulgated, and the specific nature of any effort to police false and misleading advertising. Respecting the public interest, the facts show that the present Wyler's label has proven acceptable for over 25 years to government and consumer alike. As recently as 1959, the Department of Agriculture approved the Wyler labels. (Plaintiff Complaint Exhibits C and D.) Wyler further avers that during its 25-year history it has received—to the best of its knowledge—no complaints dealing with the meat content of its mixes. On the contrary, accelerating sales figures would seem to infer some degree of customer satisfaction. (See Neisser affidavit, and Plaintiff's memo citing Washington Hearing.) Moreover, in this consideration of public interest, the Court fails to see how any price increase such as envisaged by plaintiff as a result of the new 2% requirement could accrue to the benefit of the already hard-pressed consumer. And this particularly when the cost increase is not accompanied by a commensurate rise in food value.

3. Lastly, a point is raised which the Court finds quite troublesome, concerning the actual statutory jurisdiction of the Secretary to promulgate any regulations involving less-than-2% products presently exempted from inspection. Plaintiff has steadfastly, and somewhat persuasively, argued that no authority in fact exists. This argument is made in addition to a forceful assertion by plaintiff of insubstantial evidential grounds upon which to base the proposals here questioned. (See Plaintiff Complaint and memo.)

Thus, taking the probability of irreparable damage to plaintiff-movant, the apparent lack of any harm to government or consumer brought about by a delay, and the substantiality of plaintiff's claim, it is the considered judgment of this Court that the motion for preliminary relief under Federal Rule 65 should be granted.

APPENDIX D.

OPINION OF THE DISTRICT COURT GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

(June 10, 1966)

LANE, *District Judge:*

On September 21, 1964, The Borden Company filed a complaint in this court contesting the validity of certain amended regulations promulgated by defendant, the Secretary of Agriculture of the United States, pursuant to regulatory powers granted him under the Poultry Products Inspection Act,[1] hereinafter referred to as the Poultry Act. The regulations scheduled to be effective as of January 1, 1965, would have prohibited plaintiff's subsidiary, Wyler and Company, from continued sale of "Wyler's Chicken Noodle Soup Mix" and "Wyler's Chicken Rice Soup Mix" as labeled and formulated prior to that date.[2]

Plaintiff's soup mixes involved here are dehydrated food products sold throughout the United States in foil envelopes. The Wyler chicken noodle soup mix has been sold for over 25 years and contains powdered chicken meat in an amount greater than 2% of the weight of the package, but less than 2% of the volume of the soup in its ready-to-serve state. The Wyler chicken rice soup has been sold for over 15 years, and contains the same proportion of powdered chicken. Since their introduction into the market, these soups have borne the same labels and been produced pursuant to substantially the same formulae as at present.

1. 21 U. S. C. §§ 451 *et seq.* (1964).
2. 7 C. F. R. §§ 81.134 and 81.208 (Supp. 1965).

The regulations as amended (§§ 81.134 and 81.208) are the latest product of nearly continuous efforts by the Secretary of Agriculture since the passage of the Poultry Act in 1957 to resolve a dilemma. The Secretary has sought to remove from his jurisdiction certain products which contain so little poultry that to regulate them constitutes an unnecessary burden on the Department of Agriculture and a waste of its expertise. By promulgating the predecessors of §§ 81.134 and 81.208, the Secretary had exempted from the operation of the Poultry Act all soup products with less than 2% poultry content.

Under that prior regulatory scheme, such products as dehydrated soups containing less than 2% poultry meat were still calling themselves "Chicken Soup" or otherwise purporting to contain substantial amounts of poultry meat. Having divested himself of jurisdiction over such products, the Secretary of Agriculture was powerless to insure that their labels were not false and misleading. Also, soup manufacturers such as Campbell Soup Company, whose products contain more than 2% poultry meat and are necessarily more expensive to purchase, were complaining that their soups alone should be entitled to bear the unqualified "Kind" label, "Chicken Soup."

Early in 1964, the Secretary initiated steps calculated to effect more acceptable exemption provisions. Informal hearings were held in Washington, D. C., on March 23-25, 1964. Some interested parties, including plaintiff and other soup producers, expressed their views at these hearings. Others supplied written information or expressed their opinions by letter. On June 1, 1964, the amended regulations were issued. They read, where pertinent, as follows:

§ 81.134. *Product specifications for labeling purposes.*

(a) *Authorization to establish specifications.* The

Administrator is authorized to establish specifications covering the principal constituents of any poultry food product with respect to which a specified name of the product or other labeling terminology may be used, whenever such action is necessary to prevent sale of the product under a false or deceptive name or other false or misleading labeling. The requirements of this section are hereby found to be necessary for this purpose.

. . . .

(6) *Other poultry dishes and specialty items.*

(i) . . . . Products . . . . having less than the specified minimum poultry meat content, may use the "Kind" name in the product name, provided it is appropriately qualified to distinguish such products from those containing the specified minimum meat content.

(ii) Products of the types specified in § 81.208(a) and (b) will be deemed to have false, deceptive or misleading labeling if they use the "Kind" name of the poultry (chicken, turkey, etc.) in the product name without appropriate qualification. For example, a consumer packaged noodle soup product containing less than 2 per cent chicken meat on a ready-to-serve basis may not be labeled as "Chicken Noodle Soup" but, when appropriate, could be labeled as "Chicken Flavored Noodle Soup."

. . . . .

§ 81.208. *Exemption from definition of "poultry product" of certain human food products containing poultry.*

Section 4(e) of the Poultry Products Inspection Act (21 U. S. C. 453(e)) defines the term "poultry product" to include any human food product consisting of any edible part of poultry separately or in combination with other ingredients, unless such human food product is exempted by the Secretary from such definition. It has been determined that the effectuation of the purposes of the Act does not require the full application of the requirements of the Act and the regulations to the following human food products which consist in

part of edible parts of poultry. . . . Therefore, the Poultry Products Inspection Act and the regulations thereunder shall be applicable to the following products only to the extent of requiring that they comply, in the judgment of the Secretary, with the conditions specified below and said products, if they so comply with such conditions, are exempted from the definition of "poultry product" and the application of said Act and the regulations:

(a) Any human food product (in a consumer package) not provided for in paragraph (c) of this section, if: (1) It contains less than 2 per cent cooked poultry meat (deboned white or dark poultry meat, or both); . . . and (5) the product does not in any respect have a false or misleading label. See § 81.134 with respect to labeling.) The aforesaid percentages of ingredients shall be computed on the basis of the moist, deboned, cooked poultry in the ready-to-serve product when prepared according to the serving directions on the consumer package.

Plaintiff, following the publication of these regulations, brought action in this court; and after a hearing on December 7, 1964, defendant was preliminarily enjoined from enforcing the regulations, pending judicial review of the administrative proceedings. Upon due application to this court, Campbell Soup Company, on September 30, 1965, was granted leave under F. R. C. P. 24(b) to intervene as a party defendant.

This court will consider not only the question of the evidentiary support for the contested rulings, but also several critical jurisdictional and procedural issues raised by plaintiff.

Plaintiff Borden alleges first that there is not statutory authority for the promulgation of such general, quasi-legislative standards of identity for poultry products as are set forth in § 81.134. Plaintiff also contends that the Secretary may not condition a product's exemption from

the operation of the governing act upon the type of label used, as is done in § 81.208.

The relevant statutory provisions in the Poultry Act are as follows:

21 U. S. C. § 453. *Definitions*

For purposes of this chapter—

. . .

(e) The term "poultry product" means any poultry which has been slaughtered for human food . . . in accordance with the rules and regulations promulgated by the Secretary, any edible part of poultry, or unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients.

§ 457. *Labeling* . . .

. . .

(b) The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this chapter shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. . . .[3]

. . .

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

3. Section 457 goes on to outline specific procedures for a case by case, quasi-adjudicative determination by the Secretary of the existence of misleading labels, with specific provisions for appeal by an aggrieved party to the United States Court of Appeals.

§ 463. *Rules and Regulations*

The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this chapter.

§ 467. *Jurisdiction and powers of Secretary*

(a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this chapter shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this chapter.

Jurisdiction of the Secretary of Agriculture.

In pressing its initial jurisdictional attack, plaintiff asks this court to compare the powers of the Secretary of Agriculture under the Poultry Act with those of the Food and Drug Administration under the Food, Drug and Cosmetic Act.[4] Plaintiff asserts that the latter statutes empower the F. D. A. to promulgate regulations establishing general "standards of identity"[5] for products under its jurisdiction, whereas the Poultry Act confers no such authority upon the Secretary of Agriculture. Plaintiff further contends that regulation § 81.134 is in fact such a general standard of identity because it purports to establish requirements which are not based on evidence of a "false, deceptive or misleading" label in a particular case. Without such particular evidence of consumer deception, plaintiff states, the regulation is a general standard such as the Secretary of Agriculture is not authorized to promulgate. In the present case, plaintiff continues, there are no record proofs that the labels on the Wyler's soups, or any others, affected by the regulations are "false, deceptive or mis-

4. 21 U. S. C. §§ 301 *et seq.* (1964).
5. 21 U. S. C. § 371(d) (1964).

leading." Therefore, plaintiff concludes, defendant Secretary of Agriculture has unlawfully promulgated a general standard of identity without regard to the requisite determination that the labels in issue are in fact false, deceptive and misleading.

All defendants assert that the Secretary of Agriculture does have the power to establish standards of identity by regulation. In support of this argument, the case of *Houston* v. *St. Louis Packing Co.*, 249 U. S. 479 (1918) is cited. That case involved the authority of the Secretary of Agriculture under the Meat Inspection Act to promulgate the following standards of identity for sausages:

> "Sausage shall not contain cereal in excess of two per cent: When cereal is added its presence shall be stated on the label or on the product.
>
> "Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed three per cent. . . ." *Id.* at 480.

These regulations considered in *Houston* were effected "for the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name. . . ." *Ibid.* The applicable enabling provisions in the Meat Inspection Act were:

> " '*No such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted.*' and that 'said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary

of Agriculture not inconsistent with the provisions of this Act.'" *Id.* at 481 (emphasis supplied by that court).

The Supreme Court referred to the powers of the Secretary of Agriculture, stating:

> "Whether or not the term 'sausage' when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act. . . ." *Id.* at 484.

The similarity between §§ 457(b) and 463 of the Poultry Act and the statutory grants of power cited in the *Houston* case is obvious. This court notes that the Meat Inspection Act does not (or did it in 1918) contain the "standards of identity" clause which plaintiff says is necessary to empower an administrative agency to promulgate general regulations. Nevertheless, in the *Houston* case, provisions of the Meat Inspection Act nearly identical to those of the Poultry Act were held to empower the Secretary of Agriculture to establish general regulations controlling the cereal and water content of products labeled "Sausage." Therefore, it follows that the Poultry Act contains a similar grant of authority to the Secretary concerning poultry products employing the "Kind" label.

Plaintiff argues that the hearing and review provisions of § 457(b) of the Poultry Act see footnote 3, *supra*) limit the Secretary of Agriculture to a case by case adjudicative procedure when dealing with potentially false or misleading labels. There is no doubt that those provisions do outline such a procedure. The Secretary, however, is not limited to that procedure alone. He is given additional powers. Sentence one of § 457(b) expressly prohibits false and mis-

leading labeling, as does § 458(d). Section 463 expressly grants to the Secretary the power "to promulgate such rules and regulations as are necessary to carry out the provisions of this chapter." Therefore, the Secretary has a general legislative power concerning matters covered by the Poultry Act *in addition* to whatever adjudicative power is conferred by particular provisions thereof.[6]

Since the Secretary of Agriculture may promulgate general regulations that indicate the circumstances under which the "Kind" label is deemed to be deceptive, the regulation in question (§ 81.134) is valid, and plaintiff's initial attack on the jurisdiction of the Secretary must fail.

In contesting regulation § 81.208, plaintiff contends the Secretary has exceeded his statutory power by exempting a less than 2% poultry meat product, and at the same time retaining the right to review and act upon the labeling used on such exempt product. The source of the Secretary's power to exempt certain foods from consideration as "poultry products" is § 453(e), and plaintiff's soups are poultry products as defined in said section unless and until the Secretary acts to exempt them. The enabling statute has been drawn with a view to relieving the Secretary of the unduly burdensome task of supervising the manufacture and sale of products that have little poultry meat, i.e., under 2%. Indeed, this is the primary reason for exemption of a product and was the sole requirement of § 81.208 before the promulgation of the amendment here under attack. If plaintiff's reasoning is accepted, the 2% provision exempting his product is the sole portion of the regulation that has been properly enacted, and the remaining portion pertaining to the Secretary's right to regulate the labels of such product would be null and void. If this

6. This court notes that § 457(b) nowhere states that it is the exclusive mode of operation for the Secretary in the labeling field; nor has any case so construing that statute come to our attention.

is so, it necessarily follows that because the enabling statute directs that exempt poultry products are to be administered under the Food, Drug and Cosmetic Act, any supervision of the labeling used on such exempt products would be the business of the Food and Drug Administration.

The Poultry Act contains no requirement that the Secretary consider a product for exemption on the sole basis that its meat content is minimal. There is no indication that Congress intended to so limit the Secretary's powers of exemption. Indeed, such a limitation might well effect one of two equally undesirable results: (1) the Secretary might find it necessary to refrain from exempting any products, however small the chicken meat content, in order to prevent the possibility of false, deceptive labeling; (2) the Secretary might be forced to exempt products solely on the basis of their low chicken meat content. In the first instance, the undue burdens of administration and the wasted expertise would be present. If the second alternative were chosen, producers of exempt soup products would be entitled to employ the "Kind" label despite the lack of a reasonable level of meat content. Such use of the "Kind" label would constitute a threat to unsuspecting consumers, and would be unduly prejudicial to producers who place on the market the more expensive products, with meat content sufficient to justify use on the "Kind" label.

It is not an answer to this problem to argue that the Food and Drug Administration could or would remedy the attendant difficulties. Prior to the promulgation of the amendment to § 81.208, use of the "Kind" label on exempted soups of slight meat content was not controlled. Indeed, this undesirable situation was the very reason for amending that regulation.

Section 81.208 presently exempts from the definition of poultry product all soups with less than 2% chicken meat content which are not sold under a false or misleading label.

The "Kind" label on a less-than-2% product is deemed misleading. All other soups containing "any edible part of poultry separately or in combination with other ingredients"[7] *remain* poultry products. By providing for the exemption in this way, the Secretary makes certain that he retains jurisdiction over all deceptively labeled products containing edible poultry. He is thus able to deal effectively with such labeling pursuant to the Poultry Act's mandate. At the same time, non-deceptive products of minimal meat content no longer burden him or his staff.

The administrative duty of establishing a standard of exemption from a defined term such as "poultry product", is analogous to establishing the limits of an "area of production" in accordance with legislative direction. A study of cases involving definitions of statutory terms indicates that an administrative official "fulfills his role when he makes a reasoned definition." *Mitchell* v. *Budd*, 350 U. S. 473, 480 (1956). *Mitchell* involved a definition of the term "area of production" as used in the Fair Labor Standards Act.[8] In summarizing the definition promulgated, the Supreme Court observed:

> "The Administrator's definition of 'area of production' provides that a plant is within the 'area of production' if it is located (1) 'in the open country or in a rural community' which is defined as not including 'any city, town or urban place of 2,500 or greater population' and (2) within a specified mileage distance from the source of 95% of its commodities." *Id.* at 476.

The United States Court of Appeals for the Fifth Circuit had declared this definition invalid on the grounds that "area" contemplated mileage boundaries only and did not provide for "any qualification by reason of size of the town where the establishment is located." *Id.* at 477. The Su-

7. 21 U. S. C. § 453(d) (1964).

8. 29 U. S. C. §§ 201 *et seq.* (1964).

preme Court, reversed on the grounds that Congress intended that a line be drawn "between agricultural enterprises operating under rural-agricultural conditions and those subject to urban-industrial conditions." *Id.* at 478. In this context, therefore, the Administrator could phrase his definition of the term "area of production" in such a way as would serve the Congressional intent. The Court concluded:

> "No definition of 'area of production' could produce complete equality, for the variables are too numerous. The Administrator fulfills his role when he makes a reasoned definition. See *Gray* v. *Powell*, 314 U. S. 402, 411. On no phase of this problem can we say that the Administrator proceeded capriciously or by the use of inadmissible standards. Experts might disagree over the desirability of one formula rather than another. It is enough for us that the expert stayed within the allowable limits." *Id.* at 480.

The *Gray* case cited above involved a determination by the Director of the Bituminous Coal Division of the Department of the Interior that the Seaboard Air Line Railway Company was not a "producer" of coal. The function of making such a determination had been specifically delegated to the Director by Congress. The Court held Congress had vested in the Director the power to make "a sensible exercise of judgment" in reaching his decision, and that the Director had done so. *Gray* v. *Powell*, 314 U. S. 402, 413 (1941).

The facts of the case at bar clearly indicate that § 81.208 of the Secretary of Agriculture's regulations is "a reasoned definition" of what products are to be considered exempt from the term "poultry product." This regulation is "a sensible exercise of judgment" by the Secretary; for it provides for the best possible workable compromise between the policies of (1) insuring against the use of false

or misleading labels and (2) allowing the Secretary to divest himself of jurisdiction over products whose poultry content is minimal.

For the reasons outlined above, this court concludes that the Secretary of Agriculture does have the authority to promulgate the plan of exemption set out in § 81.208. Therefore, plaintiff's second jurisdictional attack falls.

Scope of Review.

There are enumerated in § 10(e) of the Administrative Procedure Act [5 U. S. C. § 1009(e)] the powers and duties of a court called upon to review governmental agency actions:

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Plaintiff urges that the "substantial evidence" test of § 10(e)(B)(5) of the Procedure Act is the scope of review appropriate for the present case. That requirement, however, is applicable only to "any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute." *Ibid.* Sections 1006 and 1007 of Title 5 primarily concern adjudicative hearings and decisions by an agency, and are applicable in quasi-legislative rule-making cases only "where rules are required by statute to be made on the record after opportunity for an agency hearing. . . ."[9] The Poultry Act does not require such an agency hearing as is contemplated by either § 10(e)(B)(5) or § 4(b) of the Procedure Act when the Secretary of Agriculture is exercising his rule-making power to exempt certain foods from the classification "poultry product."[10] When no such formal hearing is required, a federal agency which is in the process of making a rule or regulation need only follow the notice and informal hearing requirements of §§ 4(a) and 4(b) of the Procedure Act [5 U. S. C. §§ 1003(a), (b)], which are:

> (a) *Notice.*—General notice of proposed rule making shall be published in the Federal Register . . . and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . . .
>
> (b) *Procedures.*—After notice required by this section, the agency shall afford interested persons an op-

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9. Administrative Procedure Act § 4(b); 5 U. S. C. § 1003(b) (1964).

10. Cf. *Sterling Davis Dairy* v. *Freeman*, ... F. Supp. ..... (D. C. N. J. 1965, opinion filed October 7, 1965), where this court applied the substantial evidence test in reviewing a formal agency hearing specifically provided for in the Agriculture Marketing Agreement Act of 1937. 7 U. S. C. §§ 601 *et seq.*

portunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. . . .[11]

Since neither §§ 1006 and 1007 of Title 5 nor any provisions of the Poultry Act require a formal "agency hearing" in the case at bar, this court concludes that Congress did not intend that the "substantial evidence" test of § 10 (e) (B) (5) of the Procedure Act be applied to the record here.

Plaintiff argues alternatively that if no formal hearing at the agency level is required, a reviewing court must conduct a trial de novo as to relevant facts, pursuant to § 10(e) (B)(6) of the Procedure Act. Despite the expressions of policy in the House Committee report alluded to by plaintiff,[12] this court holds, as have others, that where an agency properly exercises its rule-making function, and during the course thereof compiles a substantial record by means of documents and oral testimony, a trial de novo on the facts which were the basis for the rules adopted is not available to one contesting their validity.[13] To hold otherwise would be to force many agencies to hold time-consuming formal hearings, although the statutes empowering those agencies require no such hearings. Thus the public policy behind relegating to agencies such rule-making power as would otherwise lie in Congress alone, i.e. speed and efficiency, would be thwarted. The Poultry Act does not require a trial de novo of facts relevant to the Secretary of

11. In the case at bar, the Secretary complied with §§ 4(a) and 4(b) by giving timely notice of and subsequently holding the informal hearing of March 23-25, 1964.

12. See page 53 of plaintiff's memorandum on the evidence.

13. *Noren* v. *Beck*, 199 F. Supp. 708 (S. D. Cal. 1961).

Agriculture's exercise of his "exemption" powers under § 453(e) thereof. Nor is the court presented with an administrative "adjudication" such as might be "subject to a subsequent trial of the law and the facts de novo in any court."[14]

Having determined that neither the substantial evidence test of § 10(e)(B)(5) nor a trial de novo under § 10(e)(B)(6) of the Procedure Act is appropriate for the present case, this court concludes that its scope of review is limited to a determination of whether the promulgation by the Secretary of regulations §§ 81.134 and 81.208 was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[15]

The Record.

Should it be found that the evidence in the record supporting the adoption of the regulations as promulgated is sufficient to refute the contention that the Secretary acted arbitrarily, capriciously, or in abuse of his discretion, the regulations are to be declared valid. In reviewing the record, it is, of course, not the province of the court to substitute its judgment for that of the administrative agency properly authorized by Congress to exercise rule-making functions in areas where that agency possesses a unique expertise.

The evidence which the Secretary himself thought was particularly persuasive is discussed in a *Statement of Considerations* published in the Federal Register of July 7, 1964. The Secretary alluded to the following: (1) soup formulae on file with the U. S. D. A., (2) "written comments received," (3) "data . . . submitted at the oral

14. Administrative Procedure Act. § 5; 5 U. S. C. § 1004 (1964).

15. Administrative Procedure Act § 10 (e) (B) (1); 5 U. S. C. § 1009(e) (B) (1) (1964).

hearing on March 23-25, 1964." Referring to categories (2) and (3), he stated:

> "These comments and testimony came from customers or consumer oriented groups, representatives of the poultry industry and poultry associations, soup manufacturers, and other interested persons."

The oral testimony included that of Dr. Cliff D. Carpenter, a consultant to the poultry industry who testified that the preservation of the confidence of consumers required a standard of minimum poultry meat content in poultry products. He cited examples where unchecked diminishing of the meat content of chicken pies had deceived consumers and thus produced a reaction which effected a sharp drop in consumption. Also, Arnold Mayer, Legislative Representative of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, said that a consumer had the right to expect at least 2% meat, measured on a ready-to-serve basis, in soups bearing the unqualified kind label. Further, several executives of major soup companies[15] testified in favor of the regulations as finally promulgated, as did H. P. Schmitt, research director for the National Association of Frozen Food Packers.

Written comments included a letter from Mrs. Esther Peterson, the Special Assistant to the President for Consumer Affairs, dated April 15, 1964, stating:

> "Since the label on a product is the consumer's primary guide in making a wise decision, it must be meaningful. Products which differ substantially in poultry content should not bear the same or similar labeling terminology. The establishment of minimum standards for labeling purposes is in accordance with one of the important rights of consumers as set forth by the President—the right to be informed."

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15. Andrew Paretti, president and general manager of Bon Vivant Soups, Inc.; Carl Hinshaw of Chalet Suzanne Foods, Inc.; Donald W. Leeper of H. J. Heinz Company; and Donald M. Mounce, a vice-president of Campbell Soup Company.

Mrs. Peterson also contended that since the ready-to-serve stage was of primary importance to the consumer, all minimum content standards should relate to that stage regardless of the form of packaging. Another letter which appears is that of New York University professor Dr. Irene Oppenheim of the Department of Home Economics, who, on April 6, 1964, wrote to Mr. Kilpatrick of the Department of Agriculture that "intelligent consumer choice" in this day of multiple soup products demanded minimum content standards measured on a ready-to-serve basis. Senators, Congressmen, and home economics associations also submitted written statements.

We are dealing with a regulation that requires computing the percentage of the poultry ingredients on the basis of the cooked ready-to-serve product prepared according to the serving directions on the consumer package. The statistical evidence relied upon by the Secretary established that more than 90% of all poultry soups placed on the market meet this test, i.e. they contain more than 2% poultry meat when served. Therefore, it is clear that the Secretary's choice of that figure as the acceptable minimum meets the test of reasonableness.

In the *Statement of Considerations,* the Secretary specifically referred to the most telling evidence against the regulations adopted. He noted that although many home cookbook recipes do not call for chunks of chicken meat, many others do, and that in any case these recipes are not necessarily "a useful guide in establishing standards for similar commercially prepared products." He resolved an ambiguity concerning the name given to a less-than-2% soup by the United States Army by determining that the approved title is "Soup, Dehydrated, Chicken Flavored." He discounted the relevancy of surveys and polls conducted at plaintiff Borden's request and observed that the findings therein are susceptible to interpretations which would in-

dicate consumer deception with a less-than-2% product bearing the unqualified "Kind" name. Finally, the Secretary recognized the many years of consumer acceptance of such soups, but concluded that acceptance of a product "does not necessarily mean that it does not have misleading labeling."

The *Statement of Considerations*, a candid report by the Secretary of his analysis and findings, clearly indicates that the Secretary objectively weighed all the evidentiary material brought to his attention, and took into account the interests of the various contributors. We find that the record contains evidence sufficient to support the amended regulations against the attack that they are arbitrary, capricious, beyond the scope of the Secretary's discretion or otherwise unlawful. Indeed, this court is satisfied that even if the evidential standard of "substantial evidence" were to be applied to the record herein reviewed, the proofs would be sufficient to meet such a test.

Defendants are to submit a form of judgment.

APPENDIX E.

ORDER AND JUDGMENT OF THE DISTRICT COURT.

(July 13, 1966.)

This matter having come on before the Court on the motion for summary judgment filed by the defendants, and the Court having considered the pleadings, briefs, and oral argument of counsel and having reviewed the certified record of the Department of Agriculture regarding the promulgation of the challenged amendments and having rendered its opinion on June 10, 1966, it is this 13th day of July, 1966,

ORDERED, ADJUDGED AND DECREED

1. That the motion for summary judgment filed by the defendants, be, and it is hereby, granted.

2. That the preliminary injunction entered by this Court on January 11, 1965, be, and it is hereby, vacated.

3. That the complaint filed by the plaintiff, be, and it is hereby, dismissed.

LANE, *J.*
United States District Judge.

APPENDIX F.

OPINION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed December 29, 1966.)

PER CURIAM.

In the instant case the Borden Company sought declaratory and injunctive relief against the enforcement of certain regulations promulgated by the Department of Agriculture, under the authority of the Poultry Products Inspection Act, 21 U.S.C.A. 451 et seq., with relation to the labeling of its products, dehydrated chicken noodle soup mix and dehydrated chicken rice soup mix.

The District Court rejected the Borden Company's contention that the Regulations were not supported by substantial evidence and were arbitrary. It further held that the defendant Secretary of Agriculture had authority to promulgate the Regulations. The Borden Company appealed from the District Court's entry of summary judgment in the Secretary's favor.

On review of the record we find no error. The Order and Judgment of the District Court entered July 13, 1966 will be affirmed on the well-reasoned opinion of Judge Lane. 256 F. Supp. 592 (1966).

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX G.

JUDGMENT OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 13, 1966, be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF,
Clerk.

December 29, 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1078

THE BORDEN COMPANY, PETITIONER

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, ET AL., AND CAMPBELL SOUP COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS FREEMAN, ET AL., IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 25a–43a) is reported at 256 F. Supp. 592. The *per curiam* opinion of the court of appeals (Pet. App. 45a) is reported at 369 F. 2d 404.

JURISDICTION

The judgment of the court of appeals (Pet. App. 46a) was entered on December 29, 1966. The petition for a writ of certiorari was filed on February 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a regulation of the Department of Agriculture setting minimum standards for poultry meat content in poultry soup products was supported by evidence in the administrative record.

2. Whether the Department of Agriculture had authority to promulgate such a regulation.

3. Whether the Administrative Procedure Act or other applicable procedural rules were violated in the promulgation of the regulation.

4. Whether the district court sustained the regulation on grounds other than those relied on by the Department of Agriculture.

STATUTES INVOLVED

The relevant statutes and regulations appear in Appendix, pp. 11–18, *infra*.

STATEMENT

The Poultry Products Inspection Act ("PPIA"), 21 U.S.C. 451, *et seq.*, confers upon the Secretary of Agriculture exclusive jurisdiction over the marketing of poultry and poultry products [1] moving in interstate commerce. 21 U.S.C. 467. The Act, which also prohibits "false or misleading" labeling of poultry products (21 U.S.C. 457(b), 458(d)), empowers the Secretary to issue rules and regulations necessary to effectuate the purposes of the Act. 21 U.S.C. 463.

Acting under this statutory authority, the Secre-

[1] The term "poultry products" is defined to include "unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients." 21 U.S.C. 453(e).

tary issued proposed standards governing minimum poultry meat content in certain poultry food products in April 1963 and supplemented these proposed standards with standards relating to other products—including poultry soup—in a notice of proposed rulemaking published in the Federal Register in October 1963. 28 Fed. Reg. 11017. In February 1964, the Secretary published in the Federal Register additional proposals to amend the exemptions of certain poultry products to conform with the rules proposed several months earlier. 29 Fed. Reg. 2892. Upon notice published in the Federal Register (28 Fed. Reg. 14432, 29 Fed. Reg. 530) oral public hearings were held on March 23, 24, and 25, 1964, on the question whether poultry soup products, labeled as such, should be required to contain at least two percent poultry meat. On July 1, 1964, the Secretary issued regulations, to take effect on January 1, 1965, which provided, *inter alia,* that poultry soup mixes labeled as such without qualification (*e.g.,* "chicken soup") would be considered deceptive if they contained less than two percent poultry meat in their ready-to-serve form. 7 C.F.R. 81.134(c)(6)(ii); pp. 16–17, *infra.* The regulations authorized labeling of such a product containing less than two percent poultry meat, "when appropriate," with a qualifying term (*e.g.,* "chicken flavored * * * soup"). *Ibid.*[2]

[2] At the same time, the regulations exempted—under the Secretary's power to issue exemptions for "poultry products" (see note 1, *supra*)—products containing less than two percent poultry meat which are properly labeled and do not "in any respect have a false or misleading label." 7 C.F.R. 81.208(a); pp. 17–18, *infra.*

Petitioner thereupon instituted this action for declaratory and injunctive relief alleging that it manufactures and sells a dehydrated chicken noodle soup mix and a chicken rice soup mix, both of which contain less than the required minimum quantity of chicken meat in their ready-to-serve form. Petitioner contended that the Department of Agriculture did not have the power to promulgate the regulation at issue; that the administrative record failed to contain evidence that use of unqualified labels on poultry soup products containing less than two percent poultry meat was deceptive or misleading; and that there were procedural flaws in the administrative process. The district court rejected these claims, granted respondents' motion for summary judgment and dismissed the complaint (Pet. App. 25a–44a). The court of appeals affirmed *per curiam* on the opinion of the district court (Pet. App. 45a).

ARGUMENT

1. The district court and the court of appeals not only rejected the assertion that the challenged regulations were "arbitrary, capricious, beyond the scope of the Secretary's discretion or otherwise unlawful" (Pet. App. 43a); they also held that the regulations were supported by substantial evidence (Pet. App. 43a, 45a). Petitioner attacks these holdings on the ground that there was insufficient proof in the administrative record that consumers would be deceived by the prohibited unqualified labels. It was a plainly permissible inference, however, from the material presented to the Secretary in the administrative proceedings that the standard prescribed was necessary

to prevent consumer deception. Both the Secretary (Pet. App. 8a–11a) and the district court (Pet. App. 40a–43a) referred to views expressed by representatives of consumer-oriented groups in response to the Secretary's invitation to comment upon the proposed standards. These individuals, including the Special Assistant to the President for Consumer Affairs, strongly recommended the establishment of minimum meat content standards for labeling purposes in order to protect consumers. There was also general agreement that the two percent minimum meat content standard was reasonable in the accomplishment of that objective.

The Secretary (Pet. App. 9a) and the district court (Pet. App. 42a) noted that more than 90 percent of all poultry soups marketed in the United States under an unqualified label contained more than two percent poultry meat on a ready-to-serve basis. The Secretary also relied upon (Pet. App. 10a) the results of consumer identification tests which had been commissioned by petitioner. In one of these tests, 660 housewives sampled one of petitioner's soup mixes containing less than two percent chicken meat. Of that group 27 percent was unable to identify the product as "chicken soup." In light of this evidence, the finding that it would be misleading to consumers to label soup such as petitioner's as "chicken noodle soup" (rather than "chicken flavored noodle soup") was plainly a permissible exercise of the power conferred upon the Secretary.

Houston v. *St. Louis Packing Co.*, 249 U.S. 479, supports, rather than conflicts with, the decision be-

low. In the *Houston* case, the Secretary of Agriculture, acting under authority similar to that conferred by the PPIA, promulgated a regulation declaring that the addition of water, ice or cereal to sausage, beyond certain specified percentages, would render its labeling as "sausage" false and deceptive. This Court sustained the Secretary's exercise of power and the validity of the regulation. Petitioner contends that the *Houston* decision conflicts with this case because the test applied there was whether substantial evidence supported the regulation; the short answer is that both courts below applied a similar test here. In any event, the appropriateness of the standard was not argued in the *Houston* case, and, we submit, the proper standard today under the Administrative Procedure Act with respect to rule-making of this kind is whether there is a rational foundation for the rule (*i.e.*, that it is not arbitrary, capricious or unlawful). Section 10(e)(B)(1) of the Administrative Procedure Act, 5 U.S.C. 1009(e)(B)(1); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207. That test was obviously satisfied here.

2. The *Houston* case provides clear support for the the Secretary's authority to issue regulations such as those challenged here, notwithstanding the absence of any specific standard-of-identity authority comparable to that conferred on the Food and Drug Administration by the Federal Food, Drug and Cosmetic Act. To be sure, the PPIA gives the Secretary the power to direct any person using a deceptive label to cease using it and provides for an administrative

hearing and judicial review of the Secretary's order. 21 U.S.C. 457(b), pp. 11–12, *infra*. But, as the district court observed (Pet. App. 32a–33a and n. 6), the Act does not state that the remedy specifically provided is exclusive. It is entirely appropriate, we submit, for the Secretary to proceed in this area by rule-making under his general authority to prescribe regulations designed to effectuate the purposes of the Act.

We also note that the availability of the specific remedy detailed in 21 U.S.C. 457(b) may render the present action premature under the analysis outlined in our brief in *Abbott Laboratories* v. *Gardner*, No. 39, this Term, pp. 35–55.[3] The question of prematurity was not, however, argued below, and we do not, therefore, rely on it here.

3. (*a*) There is no substance to the claim that procedural rules were violated by the Department of Agriculture in promulgating these regulations. There was strict compliance with the Administrative Procedure Act, which, with respect to rule-making proceedings, requires only that affected parties be given appropriate notice of contemplated action and an opportunity to submit their views in writing. 5 U.S.C. 1001, 1002, 1003. Indeed, the Secretary went beyond the minimal requirements; an oral public hear-

[3] The *Abbott Laboratories* case and its companion, *Gardner* v. *Toilet Goods Association*, Nos. 336, 438, this Term, concerned interpretive regulations of the Food and Drug Administration, and we also argued in those cases that, irrespective of general "ripeness" principles, the statutory scheme under the Food, Drug and Cosmetic Act particularly foreclosed premature judicial intervention. Hence this case is distinguishable from *Abbott Laboratories* and *Toilet Goods*.

ing was held to afford interested parties an opportunity to express views. 28 Fed. Reg. 11017, 14432.

Morgan v. *United States*, 304 U.S. 1, cited by petitioner (Pet. 18–19), involved a quasi-judicial rate-making proceeding governed by a statute requiring a hearing. No such hearing was required here. And even in *Morgan*, this Court's prime concern was that the parties be made aware of the government's proposals and have an opportunity to rebut them. Petitioner does not—and indeed could not—argue here that it was unaware of the action which the Secretary proposed to take or that it was not offered an opportunity to present its views on this action.

(*b*) The courts below also correctly rejected petitioner's claim (Pet. 19–23) that the Secretary had improperly relied on "confidential" evidence which petitioner was not permitted to refute. Since rule-making was involved, the Secretary was not obliged to furnish petitioner with documents upon which he relied. In fact, in this case the Secretary made available to petitioner, after the commencement of this action, all of the matter which formed the basis of his decision, with the exception of certain privileged documents. Upon its *in camera* examination of the entire administrative file, the district court upheld the Secretary's conclusion that the privileged documents should not be made available.

(*c*) Nor is there substance to petitioner's assertion (Pet. 21–23), that the Secretary submitted a "tailored" administrative record to the district court. Every relevant document—including all of the evi-

dence tending to support petitioner's position that the standard of identity was unwarranted—was furnished to the district court. Petitioner made the same allegation of bad faith in both courts below; neither deemed it of sufficient substance to warrant discussion.

(*d*) The challenged regulations were actually issued by respondent Grange, Deputy Administrator, Agricultural Marketing Services, under authority delegated by the Secretary. 22 Fed. Reg. 7108, 29 Fed. Reg. 3114. Petitioner's assertion (Pet. 15–16) that Grange failed to exercise his independent judgment in promulgating the regulations is without merit. The Administrator recited, in the Statement of Considerations which accompanied the amendments, that "[c]onsideration has been given to all data, views and arguments presented at the hearing or in writing pursuant to the notice of rule-making and to all other relevant information available in the Department of Agriculture." It is well established that courts will not allow "the Administrator's recitation that he has personally examined [the record] in making his decision to be successfully challenged by a mere allegation in a brief." *Willapoint Oysters* v. *Ewing,* 174 F. 2d 676, 696 (C.A. 9), certiorari denied, 338 U.S. 860.

4. Petitioner also contends (Pet. 16–18) that the rule of *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, was violated because the district court sustained the regulations on the theory that the Secretary had "general legislative power"

and not on the Secretary's finding that the regulations were needed to protect consumers against deception. The claim is refuted by the district court's opinion which refers at several points to the regulations as based upon the Secretary's power to determine when labeling "is deemed to be deceptive" (Pet. App. 33a; see Pet. App. 34a, 36a–37a). Indeed, in relating the evidence in the record which supported the Secretary's decision, the district court emphasized the proof relating to deception of consumers and the testimony of the Special Assistant to the President for Consumer Affairs. There was obviously no failure on the part of the district court to realize that the Secretary was acting under his authority to protect consumers against false and misleading labeling.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
BAREFOOT SANDERS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
NANCY A. WYNSTRA,
Attorney.

MARCH 1967.

APPENDIX

1. The Poultry Products Inspection Act, 71 Stat. 441, 21 U.S.C. 451 *et seq.*, provides in relevant part as follows:

> 21 U.S.C. 453:
>
> (e) The term "poultry product" means any poultry which has been slaughtered for human food from which the blood, feathers, feet, head, and viscera have been removed in accordance with rules and regulations promulgated by the Secretary, any edible part of poultry, or, unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients.
>
> * * * * *
>
> 21 U.S.C. 457:
>
> (b) *False or misleading labeling.* The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this chapter shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the

label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 194 of Title 7 shall be applicable to appeals taken under this section.

21 U.S.C. 458:

The following acts or the causing thereof are prohibited:

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

21 U.S.C. 461:

(a) Any person who violates the provisions of section 458, 459, 460, or 466 of this title, shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than six months, or a fine of not more than $3,000, or both such imprisonment and fine; but if such violation is committed after one conviction of such person under this section has become final such person shall be subject to imprisonment for not more than one year, or a fine of not more than $5,000, or both such imprisonment and fine; but if such violation is committed after two or more convictions of such person under this section have become final such person shall be subject to imprisonment for not more than two years, or a fine of

not more than $10,000, or both such imprisonment and fine. When construing or enforcing the provisions of said sections the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association within the scope of his employment or office shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

21 U.S.C. 463:

The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this chapter.

21 U.S.C. 464:

(a) The Secretary shall, by regulation and under such conditions as to sanitary standards, practices, and procedures as he may prescribe, exempt from specific provisions of this chapter—

* * * * *

(3) for such period of time as the Secretary determines that it would be impracticable to provide inspection and the exemption will aid in the effective administration of this chapter, any person engaged in the processing of poultry or poultry products for commerce and the poultry or poultry products processed by such person: *Provided, however,* That no such exemption shall continue in effect on and after July 1, 1960; and * * * *

21 U.S.C. 467:

(a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this chapter shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Foods, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this chapter.

(b) In carrying out the provisions of this chapter, the Secretary may cooperate with other branches of Government and with State agencies and may conduct such examinations, investigations, and inspections as he determines practicable through any officer or employee of a State commissioned by the Secretary for such purpose.

2. The Administrative Procedure Act, 5 U.S.C. 1001 *et seq.* (1964 ed.[18]), provides in relevant part as follows:

5 U.S.C. 1001:

(c) "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

5 U.S.C. 1003:

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

[18] The Administrative Procedure Act was codified in September, 1966, as 5 U.S.C. 501 *et seq.* For convenience the old section numbers are used here.

Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

5 U.S.C. 1009

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the require-

ments of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statutes; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

3. The Regulations of the Secretary of Agriculture provide in relevant part as follows:

7 C.F.R. 81.134 Product specifications for labeling purposes.

(a) *Authorization to establish specifications.* The Administrator is authorized to establish specifications covering the principal constituents of any poultry food product with respect to which a specified name of the product or other labeling terminology may be used, whenever such action is necessary to prevent sale of the product under a false or deceptive name or other false or misleading labeling. The requirements of this section are hereby found to be necessary for this purpose.

* * * * *

(c)(6)(i) Poultry dishes and specialty items listed in Table IV of this paragraph shall meet the requirements set forth in said Table, irrespective of the type of packaging, and the percentages in Table IV shall be calculated on a ready-to-serve basis * * *. Products similar to those listed in Table IV, but having less than the specified minimum poultry meat content, may use the "Kind" name in the product name, provided it is appropriately qualified to distinguish such products from those containing the specified minimum meat content.

(c)(6)(ii) Products of the types specified in §§ 81.208(a) and (b) will be deemed to have false, deceptive or misleading labeling if they use the "Kind" name of the poultry (chicken,

turkey, etc.) in the product name without appropriate qualification. For example, a consumer packaged noodle soup product containing less than 2 percent chicken meat on a ready-to-serve basis may not be labeled as "Chicken Noodle Soup" but, when appropriate, could be labeled as "Chicken Flavored Noodle Soup."

TABLE IV

Product name	Minimum percent cooked deboned poultry meat of kind indicated	Minimum percent cooked poultry of kind indicated, including bone
(Kind) Ravioli	2	
(Kind) Soup	2	
* * *	*	*

7 C.F.R. 81.208:

* * * * *

(a) Any human food product (in a consumer package) not provided for in paragraph (c) of this section, if: (1) It contains less than 2 percent cooked poultry meat (deboned white or dark poultry meat, or both); (2) it contains less than ten percent of cooked poultry skins, giblets, or fat, separately, and less than ten percent of cooked poultry skins, giblets, fat, and meat (deboned white or dark poultry meat or both) in any combination; (3) the poultry ingredients used in the product were prepared under inspection as defined in § 81.1, or were inspected under a substantially equivalent foreign inspection system and imported in compliance with the Act and the regulations; (4) the immediate container of the product bears a label which shows the name of the product, a statement of the ingredients in the product, including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, and the name and address of the person preparing or distributing the product; and (5) the product does not in any respect have a false

or misleading label. (See § 81.134 with respect to labeling.) The aforesaid percentages of ingredients shall be computed on the basis of the moist, deboned, cooked poultry in the ready-to-serve product when prepared according to the serving directions on the consumer package.

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SUPREME COURT, U. S.

No. 1078

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Supreme Court of the United States

OCTOBER TERM, 1966

THE BORDEN COMPANY, *Petitioner,*

v.

ORVILLE L. FREEMAN, *et al., Respondents,*

and

CAMPBELL SOUP COMPANY, *Intervenor-Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR CAMPBELL SOUP COMPANY IN OPPOSITION

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March, 1967

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1078

THE BORDEN COMPANY, *Petitioner,*

v.

ORVILLE L. FREEMAN, *et al., Respondents,*

and

CAMPBELL SOUP COMPANY, *Intervenor-Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR CAMPBELL SOUP COMPANY IN OPPOSITION

Campbell Soup Company ("Campbell"), intervenor-respondent, opposes the petition by The Borden Company ("Borden") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 29, 1966. The petition raises no important or novel federal question which should be decided by this Court.

STATUTES INVOLVED

The statutes principally involved are the Poultry Products Inspection Act ("PPIA"), 71 Stat. 441 (1957), *as amended,* 21 U.S.C. §§ 451-69 (1964), and the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001 *et seq.* (1964).[1] Pertinent provisions of these statutes, in addition to those printed in Appendix A to the petition for certiorari, are set forth in Appendix A, *infra,* pp. A1-A4.

QUESTIONS PRESENTED

Campbell believes that the following questions are presented:

1. Whether a federal question of substance is presented by the holding of the court of appeals and the district court that the Secretary of Agriculture ("Secretary") had authority under the Poultry Products Inspection Act ("PPIA") to promulgate the amended regulations here challenged.

2. Whether a federal question of substance is presented by the holding of the court of appeals that the district court correctly limited its scope of review to a determination, on the basis of the record filed with it by the Secretary, of whether the Secretary's promulgation of the challenged amended regulations was

[1] Public Law No. 89-554, 80 Stat. 378 (1966), enacted Title 5 of the United States Code into positive law. The sections of the former Administrative Procedure Act have been rewritten and scattered throughout Title 5. Since both the administrative action and judicial review were accomplished under the provisions of the former Administrative Procedure Act, and since there has been no change of substance which would affect any issue in this case, all references in this brief shall be to the former Administrative Procedure Act.

"arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law".

3. Whether any federal question of substance is presented by the holding of the court of appeals that the district court correctly determined to dispose of the case on summary judgment on the basis of the administrative record filed with the district court by the Secretary.

4. Whether a federal question of substance is presented by the holding of the court of appeals that the district court correctly decided that the Secretary's regulations were not arbitrary or capricious and, even if the "substantial evidence" test applied, were in fact supported by substantial evidence.

STATEMENT

Petitioner brought this action for a declaratory judgment that certain amendments to sections 81.134 and 81.208 of the Regulations of the United States Department of Agriculture ("USDA") are invalid insofar as they apply to petitioner's dehydrated soup mix products containing poultry ingredients, and for an injunction restraining the governmental respondents from enforcing the amended regulations against petitioner.[2] These amended regulations are set forth in Appendix B to the petition for certiorari, pp. 12a-20a. Campbell was permitted to intervene as a de-

[2] Petitioner has apparently dropped its contention that the Secretary had no power under the PPIA to adopt conditional exemptions from the Act, as in the amended section 81.208(a). There can be no doubt of the Secretary's power to adopt such exemptions, in view of section 4(e) of the PPIA, 21 U.S.C. § 453(e). See Opinion of the district court, Petitioner's Appendix A, pp. 33a-37a.

fendant in the district court by order of that court dated September 30, 1965. (R. 659.)[3]

Previous Regulatory Efforts Under the PPIA

Although enacted in 1957, the PPIA did not come into effect until January 1, 1959. Pub. L. No. 85-172, § 22, 71 Stat. 449 (1957). On the effective date, however, the USDA, acting under section 15(a)(3) of the Act, 21 U.S.C. § 464(a)(3), exempted all "further processing" operations, including the manufacture of poultry soups, from the Act until July 1, 1960. (R. 184-85.)[4] Effective in September 1959, the USDA added a new section 81.208 to its regulations under the PPIA. 24 Fed. Reg. 6833 (Aug. 22, 1959). Under this section, soup products (including dehydrated soups) containing "less than 2 percent cooked poultry meat" were exempted from classification as "poultry products" under the PPIA, provided that federally inspected meat was used. The "kind name" (such as "chicken" or "turkey") was not to be used in the product name of exempted products, because they were not "poultry products."

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[3] Throughout this brief, Campbell shall follow the citation system adopted in the petition for certiorari. Record references are to pages in the Joint Appendix filed in the court of appeals and transmitted to this Court. Like petitioner, Campbell has deleted the letter "a" from references to pages of the Joint Appendix.

[4] The USDA's approval of petitioner's labels on February 24, 1959 (R. 25, 26), which is mentioned on page 5 of the petition for certiorari, is thus without any probative value in this case. It is quite likely that the USDA approved petitioner's labels pursuant to the voluntary inspection program under the Agricultural Marketing Act of 1946, § 203(h), 60 Stat. 1087, *as amended*, 7 U.S.C. § 1622(h)(1964). (R. 123, 137-40.)

The USDA intended that the 2 per cent poultry meat specified for soups in section 81.208 be computed on a ready-to-serve basis. (R. 122, 185, 191.) When the USDA reached soups around the early part of 1961 in its item-by-item review of "further processing" operations (R. 124), it received objections to its computation of the poultry meat content of soups on a ready-to-serve basis. (R. 122.) The USDA answered these objections and reaffirmed its interpretation of section 81.208 in an authoritative letter to the industry and USDA officials, dated May 19, 1961. (Complaint Ex. E; R. 27-28, 123.)

Even though the 2 per cent poultry meat standard appeared in an exemption provision, it was also intended to be a labeling standard. (R. 206.) The Department's May 19, 1961 letter indicated that "[s]ome adjustments in labeling will probably be necessary" in the case of soups and dehydrated soup mixes that did not meet the 2 per cent standard and which would be eligible for inspection only under the voluntary inspection program.[5]

During this period of uncertainty in 1960 and 1961, Campbell, a manufacturer of prepared foods including poultry soups, and other manufacturers of poultry soups were required by the USDA to increase the meat content of some of their poultry soups in order to obtain approval of their labels, which bore the "kind" name, *i.e.*, "chicken" or "turkey." (R. 335-36, 387-89.) Moreover, when Campbell introduced its line of consumer dried soup mixes in 1961, it was told

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[5] Prior to the PPIA, voluntary inspection of poultry products was available under the Agricultural Marketing Act of 1946. See p. 4, n. 4, *supra*.

by the USDA and the Food and Drug Administration ("FDA") that regulations would soon be promulgated effectively enforcing the minimum meat content standard of 2 per cent on a ready-to-serve basis. Accordingly, Campbell labeled its new under-2 per cent dehydrated soup "Noodle Soup with Real Chicken Stock"—a product comparable to petitioner's "Wyler's Chicken Noodle Soup Mix"—and reserved use of the unqualified "kind" name to its above-2 per cent product. (R. 343, 346-47.)

In June 1961, the USDA proposed to amend its regulations under the PPIA in order to "eliminate misunderstanding concerning the amount of poultry meat that can be included in certain food products without requiring them to be inspected under the Act." 26 Fed. Reg. 5958 (July 1, 1961). Accordingly, in September 1961, the USDA added a new paragraph (c) to section 81.134, requiring that soups, soup mixes, and soup bases labeled with the "kind" name contain not less than 2 per cent cooked poultry meat on a ready-to-serve basis. The exemption section, § 81.208, was also amended to state clearly that the poultry meat content of soup products must be computed on the ready-to-serve (or reconstituted) basis. 26 Fed. Reg. 8559-60 (Sept. 13, 1961). In promulgating these amendments, the USDA recited that it found the requirement of 2 per cent poultry meat on the ready-to-serve basis to represent "historical average trade practices and consumer expectancy." (26 Fed. Reg. 8560.)

The period of regulatory transition and uncertainty should have ended with promulgation of the 1961 amendments. However, a number of "interested parties" objected to the flat prohibition in section 81.208 against use of the kind name on products not meet-

ing the 2 per cent standard. The USDA agreed that that section could be interpreted to exclude even the qualified use of the kind name (such as "chicken-flavored") on products not meeting the standard but characterized by a poultry flavor. (R. 153.)

The USDA decided to cure this ambiguity by revoking the 1961 amendments of sections 81.134 and 81.208 before they became effective. Accordingly, the Department dropped its addition to section 81.134 and simply amended section 81.208 to provide that any food product (including soups and soup mixes) would be exempted from classification as a "poultry product" under the Act provided, *inter alia,* (1) that it was made from federally inspected meat, and (2) that it contained less than 2 per cent poultry meat computed on the ready-to-serve basis. 27 Fed. Reg. 8097-98 (Aug. 15, 1962) (Complaint Ex. I; R. 44, 47-48). Jurisdiction as to the labeling of exempted products was to rest with the FDA. 27 Fed. Reg. 5562 (June 12, 1962).[6] This new version of section 81.208 went into effect on March 1, 1963, and has remained in effect ever since because of the pendency of this action, including the present petition. See 32 Fed. Reg. 2442-43 (Feb. 4, 1967).

Unfortunately, the FDA maintained that the USDA retained exclusive jurisdiction[7] over these supposedly exempted products because of the requirement that the

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[6] The same is true under the 1964 amendments here challenged by petitioner, except that the conditions for exemption from the PPIA have been changed. (R. 151-55.) Of course, certain defects in the labels of under-2 per cent products will cause them to lose their exemptions.

[7] See PPIA § 18(a), 21 U.S.C. § 467(a).

meat used in such products be federally inspected (*i.e.*, subject to USDA inspection). (R. 224-25, 343-44, 471.) Moreover, the FDA informed representatives of Campbell in 1963 that it could not effectively regulate the labeling of soup products exempted by section 81.208 because of the lack of a clear labeling standard; in the FDA's view, it was up to the USDA to establish such a standard. (Doc. 63-7; R. 525-27.)[8]

Promulgation of the Challenged Amended Regulations

This regulatory impasse between the USDA and the FDA had the practical effect of leaving the labeling of soup products containing less than 2 per cent poultry meat on a ready-to-serve basis completely unregulated. Thus, quite contrary to USDA intention, products which were not "poultry products," such as petitioner's "Wyler's Chicken Noodle Soup Mix," were placed on supermarket shelves under the same unqualified kind names (*i.e.*, "chicken" or "turkey") as poultry soup products meeting the 2 per cent standard. Soup products meeting the 2 per cent standard were obviously far more expensive than those competing products which did not. (R. 237-38.) It was this unfairness to consumers and competing soup manufacturers, quite unintended by the USDA, which prompted Campbell to request that some action be taken to break the regulatory impasse between the USDA and the FDA. (Doc. 63-7; R. 525-57.)

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[8] The term "Doc." is used to refer to documents filed by the USDA in the district court as part of the administrative record, but which were not offered as exhibits at the oral hearing held by the USDA. The first part of the number (*e.g.*, "63") refers to the year file in which the document was submitted to the court by the USDA.

In October 1963, the USDA initiated the rulemaking proceeding which eventually led to promulgation of the challenged amended regulations. 28 Fed. Reg. 11,017-18 (Oct. 15, 1963) (Complaint Ex. K, R. 53-61). It proposed to break the administrative deadlock by amending section 81.134 of its regulations to provide (1) that the meat content of consumer packaged poultry soups be calculated on a ready-to-serve basis and (2) that products similar to poultry soups, but containing less than the required 2 per cent poultry meat, may use the "kind" name on the label only if the name is "appropriately qualified to distinguish such products from those containing the specified minimum meat content". Written comments and relevant data were invited, and the USDA stated that it was willing to receive requests for an oral hearing.

It was soon apparent, however, that the proposed amendment to section 81.134, without more, would not eliminate the regulatory gap. The FDA informed representatives of Campbell that it would still not be able to undertake effective regulation of the labeling of soup products containing less than 2 per cent meat on a ready-to-serve basis. (R. 352.) Accordingly, Campbell proposed that the exemption section (§ 81.208) be amended to provide clearly for USDA jurisdiction over the labeling of certain under-2 per cent soup products. (Ex. 20; R. 353, 500-04.)[9] This proposal, as well as an alternative proposed amendment to section 81.208, was published in the Federal Register as part of the rulemaking proceeding initiated on October 15, 1963. 29 Fed. Reg. 2892 (Feb. 29, 1964) (Complaint Ex. N; R. 76-79). The alternative suggested by Campbell

[9] The term "Ex." is used to refer to exhibits introduced in the course of the oral hearing held by the USDA in March 1964.

would have required, in pertinent part, (1) that exempted products use only federally inspected meat or its equivalent; (2) that the exempted products contain less than 2 per cent poultry meat on a ready-to-serve basis; and (3) that an exempted product not use the kind name (such as chicken or turkey) in the product name. According to the USDA, this proposal would have left the USDA responsible "for regulating the labeling as to the product name and the poultry meat content of the otherwise exempted products." (R. 77.)[10]

The second proposed alternative amendment would have (1) removed the requirement that federally inspected meat be used in exempted products (including soups) and (2) exempted any product containing less than 10 per cent cooked poultry skins, giblets, fat or meat and less than 2 per cent poultry meat on the ready-to-serve basis. Nonuse of the kind name was not included as a condition for exemption. In the view of the USDA, this proposed amendment would transfer complete regulatory authority over exempted products as to both labeling and wholesomeness to the FDA. (R. 78.)

As permitted (although not required) by section 4(b) of the Administrative Procedure Act,[11] the USDA permitted interested persons to submit their views and arguments orally at a public hearing held on March 23-25, 1964. The contentions of the various interested parties, including petitioner, were explored in detail in the testimony and exhibits offered at the hearing. Counsel for petitioner not only was permitted to sub-

[10] Exempted products are not subject to inspection under the PPIA.

[11] 5 U.S.C. § 1003(b) (1964).

mit petitioner's own case, but was allowed to engage in wide-ranging cross-examination of witnesses tendered by parties whose views conflicted with those of petitioner. Counsel for petitioner was also permitted to examine an official of the USDA in great detail.

The evidence adduced at the hearing and the various written comments filed by interested persons in the course of the rulemaking proceeding, including comments by Mrs. Esther Peterson, then Special Assistant to the President for Consumer Affairs, and prominent home economists,[12] amply supported the USDA's promulgation of the challenged amended regulations. In the Statement of Considerations which accompanied the challenged amended regulations, the USDA made the following key findings, each amply supported by the record: (1) that it was necessary to establish a minimum poultry meat content standard for labeling purposes applicable to poultry soups;[13] (2) that all types of soups, whether liquid, condensed, dehydrated, or frozen, constitute a single product category and should be treated alike in the establishment and enforcement of labeling standards;[14] (3) that the minimum poultry meat content standard for poultry soups should be established at 2 per cent on the ready-to-serve basis;[15] (4) that the scheme of conditional exemp-

[12] Docs. 64-10, 64-11, 64-12, 64-14, 64-15, 64-16; R. 540-41, 544-55.

[13] See, *e.g.*, R. 216, 217, 219, 224, 300-02, 339, 471-72; Docs. 64-10, 64-11, 64-12, 64-14, 64-15, 64-16, R. 540-41, 544-55. See also, R. 116-17, 129-30 (court depositions of USDA officials).

[14] See, *e.g.*, R. 201, 219, 229-30, 314, 329, 336-37, 410, 438-39, 445-46, 451, 471-72; the "Docs." cited in n. 13, *supra*.

[15] See, *e.g.*, R. 186-87, 219, 223, 302, 304, 311-12, 315, 329, 335-36, 341-42, 450, 453-56; Doc. 59-2, R. 516; Doc. 63-11, R. 529; Doc. 64-4, R. 538-39. Doc. 59-2 is especially significant.

tion adopted in the amended section 81.208 was necessary and workable.[16] 29 Fed. Reg. 8456-59 (July 7, 1964) (Complaint Ex. R, R. 89-106).

In reaching these conclusions, the USDA pointed out that over 90 per cent of all soups which consumers buy, including one-third of consumer-purchased dehydrated soups, already met the 2 per cent standard. (R. 93-94.) The Department also rightly ignored the alleged fact that it would have been technologically impossible to manufacture dehydrated soups containing at least 2 per cent poultry meat on a ready-to-serve basis prior to 1961.[17] The amended regulations in no way prohibit anyone from manufacturing and selling soups not meeting the 2 per cent standard, provided they are properly labeled. (R. 95-96.) Finally, the USDA carefully considered the evidence offered by petitioner and other opponents of the amended regulations and found such evidence inadequate. (R. 94-95.) For example, 27 per cent of the members of a taste panel could not even identify petitioner's dehydrated soup as any kind of "chicken soup." (R. 95, 250-52, 271.)

The Prior Proceedings in This Action

Petitioner filed this action on September 21, 1964, prior to the scheduled January 1, 1965 effective date of the amended regulations. A preliminary injunction against enforcement of the regulations was granted in December 1964 and filed in January 1965. (R. 1.) Campbell was permitted to intervene as a defendant on September 30, 1965. (R. 659.) On June 10, 1966, the

[16] See, *e.g.*, R. 219, 221-22, 224-25, 337, 341, 342-45, 416-19, 436, 448-50, 451-52, 455, 456-57, 471-74.

[17] See petition for certiorari, p. 6.

district court issued its opinion. (256 F. Supp. 592; Petition Appendix D, p. 25a; R. 660-78.) The district court held: (1) that the Secretary was authorized under the PPIA to promulgate quasi-legislative standards of identity for poultry products and to exempt products conditionally from the Act; (2) that the court's review was limited to a determination, on the basis of the administrative record filed by the Secretary, of whether the promulgation of the regulations was arbitrary or capricious; and (3) that the challenged amended regulations met the test of reasonableness and were not arbitrary or capricious or otherwise unlawful. The district court also found, alternatively, that even if the "substantial evidence" test applied, the Secretary's action in promulgating the amended regulations was supported by substantial evidence. (R. 678.)

On July 14, 1966, the district court entered its order and judgment granting respondents' motion for summary judgment, vacating the preliminary injunction, and dismissing petitioner's complaint. (Petition Appendix E, p. 44a; R. 679.)

After granting an expedited appeal, the United States Court of Appeals for the Third Circuit, per curiam, affirmed the district court's order and judgment "on the well-reasoned opinion of Judge Lane". (Petition Appendix F, p. 45a.) Thus the court of appeals, like the district court, also determined after its review of the record that the Secretary's amended regulations were supported by substantial evidence.

ARGUMENT

I. The Courts Below Correctly Determined That the USDA Had Power Under the PPIA To Adopt the Challenged Amended Regulations, and Further Review Is Not Warranted.

Under section 14 of the PPIA, 21 U.S.C. § 463, the Secretary is directed to promulgate "such rules and regulations as are necessary to carry out the provisions of this chapter." Two of those provisions are sections 8(b) and 9(d), which prohibit the sale or offer for sale of any poultry product under any false or deceptive name or the use of a false or misleading label on any such product. Soup products containing *any* poultry ingredients are "poultry products" under the Act, unless specifically exempted by the Secretary. § 4(e), 21 U.S.C. § 453(e). These provisions of the Act, taken together, fully empowered the Secretary to adopt the challenged amended regulations.

Under the very similar statutory scheme of the Meat Inspection Act, upon which the PPIA was modeled,[18] this Court squarely upheld the power of the Secretary to promulgate standards of identity for labeling purposes. *Houston* v. *St. Louis Independent Packing Co.*, 249 U.S. 479 (1919). Petitioner's attempt to find a conflict with *Houston* in the present case (Petition pp. 12-13) must fail. Quite apart from the fact that *Houston* arrived in the courts in an entirely different procedural posture from the present case, it is apparent from examination of the lower court opinions in that case (1) that there is no indication that the Secre-

[18] See S. Rep. No. 195, 85th Cong. 1st Sess. 3 (1957); H.R. Rep. No. 465, 85th Cong. 1st Sess. 4 (1957); 103 Cong. Rec. 1644 (1957) (remarks of Senator Humphrey). The pertinent provisions of the Meat Inspection Act are presently found at 34 Stat. 1262, 1264 (1907), 21 U.S.C. §§ 75, 89 (1964).

tary held a full-dress, trial-type hearing (if he held any hearing at all) before he promulgated the regulations upon which he later relied in refusing to pass the specific products involved in *Houston,* and (2) that there was no "elaborate trial on the merits" in the district court on the issue of whether the labels involved in that case were false and deceptive. See *St. Louis Independent Packing Co.* v. *Houston,* 231 Fed. 779, 781, 783 (E.D. Mo. 1916); *St. Louis Independent Packing Co.* v. *Houston,* 242 Fed. 337, 346, 347, 348-49 (8th Cir. 1917) (dissenting opinion). Thus, this Court, which decided *Houston* long before passage of the Administrative Procedure Act, did not use the term "substantial evidence" in the technical sense in which it is used today, namely, significant evidence compiled in a formal record made at a formal hearing.

The inclusion in section 8(b) of the PPIA of adjudicatory procedure to be followed by the Secretary in evaluating particular labels does not mean that he is powerless to promulgate standards of identity through general policy rulemaking.[19] This Court has frequently upheld the power of federal agencies, acting under general rulemaking authority like that in section 14 of the PPIA, to prescribe, in advance of adjudicatory hearings guaranteed by statute, standards which would be applied, without reexamination, in subsequent adjudicatory proceedings. See *FPC* v. *Texaco, Inc.,* 377 U.S. 33 (1964); *United States* v. *Storer Broadcast-*

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[19] If petitioner's contention is that the Secretary in fact adjudicated against it and determined that its labels violated the statute (Petition p. 19), then petitioner should have sought judicial review in an appropriate court of appeals. PPIA § 8(b), 21 U.S.C. 457(b). This action, then, should be dismissed for lack of jurisdiction in the district court.

ing Co., 351 U.S. 192 (1956); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). See also *American Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298 (1953); *Law Motor Freight, Inc.* v. *CAB*, 364 F. 2d 139 (1st Cir. 1966); *American Airlines* v. *CAB*, 359 F. 2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966); *Airline Pilots Ass'n* v. *Quesada*, 276 F. 2d 892 (2d Cir.), *cert. denied*, 366 U.S. 962 (1960). The fact that individuals or private companies were forced to alter or abandon long-standing profitable business arrangements in those cases did not invalidate the regulations. Nor does the fact that petitioner might be subjected to criminal penalties for violation of the challenged regulations affect the validity of the regulations. In any event, section 13 of the PPIA, 21 U.S.C. § 462, provides a mechanism for disposing of violations without criminal prosecution.

II. The Decision Below Is Not in Conflict With Prior Decisions of This Court.

1. The decision below is not in conflict with *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), or *Service* v. *Dulles*, 354 U.S. 363 (1957). In both of those cases, the agency head had promulgated legislative rules governing the procedure in certain adjudicatory proceedings. This Court held illegal personal action by the agency head in violation of those rules.

The present case involves, not adjudication, but general policy rulemaking. More importantly, the Secretary's delegation of authority to his subordinates, which is relied upon by petitioner (Petition p. 15) did not prescribe any legally binding procedure to be followed. In fact, the initial delegation by the Secretary, which

remained in effect through the various amendments and subdelegations, contained the following reservation of authority to the Secretary:

> "No delegation or authorization prescribed in this document shall preclude the Secretary from exercising any of the powers or functions or from performing any of the duties conferred herein and any such delegations or authorization is subject at all times to withdrawal or amendment by the Secretary. No delegation or authorization prescribed in this document shall preclude the exercise of any delegation or authorization otherwise provided to the Under Secretary, Assistant Secretaries, Administrative Assistant Secretary, or Assistant to the Secretary for Agricultural Credit, or to the Staff agencies as provided in section 112 hereof." 19 Fed. Reg. 74 (Jan. 6, 1954).

Thus, whatever evidence plaintiff might have offered in the district court about alleged interference by Mr. Grange's superiors in the promulgation of the challenged regulations was totally irrelevant and immaterial.

2. Similarly, the decision below is in no way in conflict with *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), or *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965). The principle stated by those cases and relied upon by petitioner (Petition pp. 16-18) was enunciated by this Court in reviewing agency adjudications, not agency general rulemaking. Indeed, in *Chenery*, this Court explicitly noted that the case before it would have been entirely different had the Commission promulgated a general rule applicable to the adjudicatory proceeding then being reviewed by the Court. 332 U.S. at 201-02. See also *SEC* v. *Chenery Corp.*, 318 U.S. 80, 92-94 (1943); *Burlington*

Truck Lines, Inc. v. *United States, supra* at 167-68. Moreover, each of these decisions is wholly distinguishable from the present case on its facts. In any event, neither the district court nor the court of appeals substituted post hoc rationalizations for the USDA's action. As noted, in addition to upholding the USDA's power to promulgate standards of identity, each of the courts below held that the Secretary's action in promulgating the regulations was supported by "substantial evidence."

III. The Procedures Followed by the Secretary and the Reviewing Courts Present No Substantial Questions of Federal Procedure Which Should Be Considered by This Court.

1. The Secretary complied fully with the requirements of the Administrative Procedure Act for rulemaking, and petitioner does not contend otherwise. There can be no doubt that the notices given by the USDA in the Federal Register fully complied with the requirements of section 4(a), 5 U.S.C. § 1003(a). It is clear that section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 1003(b), governed the rulemaking proceeding, rather than the provisions of sections 7 and 8 of that Act, since the Secretary is not required by the PPIA to make rules only "on the record after opportunity for an agency hearing." Not only did the USDA give all interested persons an opportunity to participate in the rulemaking proceeding through submission of written data, views, and arguments, but it went further and permitted them to present their views, data, and arguments orally. The oral hearing held on March 23-25, 1964, complied with section 4(b) of the Administrative Procedure Act, since the Secretary was authorized by that section to conduct such a hearing "in any manner." Finally, the USDA's

Statement of Considerations (Complaint Ex. R, R. 89-106) fully complied with the statutory requirement that "the agency . . . incorporate in any rules adopted a concise general statement of their basis and purpose."

2. Petitioner's argument (Petition pp. 18-23) that its petition raises substantial questions of federal procedure is founded entirely upon the erroneous premise that the USDA in fact took adjudicatory action against petitioner. The decisions of this Court relied upon by petitioner (Petition pp. 18-19) are thus not in point. *Morgan* v. *United States*, 298 U.S. 468 (1936), 304 U.S. 1 (1938), does not assist petitioner. Not only did that case involve ratemaking, which traditionally has always required a trial-type hearing, but the governing statute, unlike the PPIA, explicitly required a "full hearing" by the Secretary of Agriculture before he could fix new rates. 298 U.S. at 473. The other cases cited by petitioner so obviously involved administrative adjudication that no further comment is required.

The simple answer to petitioner's complaint (Petition pp. 19-20) that the Secretary relied upon "confidential" evidence is that the USDA gave petitioner, along with all other interested persons, their full rights under section 4(b) of the Administrative Procedure Act. Petitioner was not entitled to a trial-type hearing in connection with the rulemaking proceeding,[20] and it obtained more than the minimum required when the USDA held its oral hearing in the course of the rulemaking proceeding.

3. Petitioner's contention (Petition pp. 20-21) that it was entitled to a hearing before the district court is

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[20] See, *e.g.*, FPC v. Texaco, Inc., *supra*; United States v. Storer Broadcasting Co., *supra*; Law Motor Freight, Inc. v. CAB, *supra*; American Airlines v. CAB, *supra*.

similarly meritless. The fortuity that judicial review in the present case was in a district court instead of in a court of appeals gave petitioner no right to a judicial trial de novo. See *American Trucking Ass'ns, Inc.* v. *United States, supra; National Broadcasting Co.* v. *United States, supra; Noren* v. *Beck,* 199 F. Supp. 708 (S.D. Cal. 1961). Despite petitioner's apparent attempt to convey the impression that it desired only a limited judicial hearing, in fact its demand in the district court for a trial de novo was wide ranging and unspecific and reached all issues in the case as set forth in paragraphs 37-45 of petitioner's complaint. (R. 17-19, 648-49.) Moreover, the so-called "confidential" evidence referred to on page 20 of the petition for certiorari was included in the administrative record filed by the Secretary in the district court and made available to petitioner. Petitioner had ample opportunity to comment on such evidence in the many briefs it filed in the district court. Finally, despite the district court's ultimate disposition of the case on summary judgment, petitioner did take the depositions of two key USDA officials, including Deputy Administrator Grange, who actually promulgated the challenged regulations. (See R. 1, 107-59.) Thus petitioner received more than it was entitled to on judicial review.[21]

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[21] Jordan v. American Eagle Fire Ins. Co., 169 F. 2d 281 (D.C. Cir. 1948), is not in point. It involved ratemaking, in which a trial-type hearing at some level must be afforded to parties whose rates are fixed. Armour & Co. v. Freeman, 304 F. 2d 404 (D.C. Cir.), *cert. denied,* 370 U.S. 920 (1962), is inconclusive. In fact, a trial was never held in *Armour,* since the case was dismissed without prejudice shortly after certiorari was denied. Armour & Co. v. Freeman, Civil Action No. 3626-61 (D.D.C. July 12, 1962). The District of Columbia Circuit today would most likely refuse to grant petitioner a trial de novo. *Cf.* American Airlines v. CAB, *supra.*

4. The courts below correctly held that the scope of judicial review was limited to a determination of whether the USDA had acted arbitrarily or capriciously in promulgating the challenged regulations. This is plain on the face of the Administrative Procedure Act, §§ 4(b), 7, 8, 10(e)(B)(1), (5), 5 U.S.C. §§ 1003(b), 1006, 1007, 1009(e)(B)(1), (5). It is perfectly apparent from these sections that, not only was petitioner not entitled to a trial de novo, but also that the "substantial evidence" test was not applicable on judicial review.

5. The requirement that judicial review be based upon the "whole record," insofar as that requirement might apply in review of a rulemaking proceeding, was amply fulfilled in the present case. The USDA met its obligation of filing in the district court the record on which it had relied in promulgating the challenged regulations.

The examples of alleged "tailoring" of the record cited by petitioner (Petition pp. 21-22) are frivolous. The military specification mentioned by petitioner was initially injected into the case when an opponent of the amended regulations introduced at the hearing a specification dated 20 November 1957 and entitled "Dehydrated chicken soup, Type II, with noodles." (Ex. 19; R. 333.)[22] In the Statement of Considerations, the USDA simply noted that the 1957 specification had been superseded by one dated 20 June 1963 and entitled "Soup, Dehydrated, Chicken-Flavored." (Doc. 63-3; R. 94, 517.) The discrepancy between the cover

[22] Exhibit 19 was not printed in the Joint Appendix filed in the court of appeals, although it was included in the record transmitted to that court.

page of the 1963 specification and the labeling requirement in the text of the specification was obviously a simple oversight. This oversight has now been corrected by a revised specification dated 14 February 1966, portions of which are printed in Appendix B, *infra,* pp. A5-A6.[23] This latest specification requires that containers for the soup, which contains less than 2 per cent chicken meat on a ready-to-serve basis, be labeled "Soup, Dehydrated, Chicken-Flavored With Noodles." It should also be noted that the USDA did not request the military authorities to change the title of the specification in 1963, and there was no coordination between the USDA and the military concerning that change. (R. 149.)

Petitioner's second example of alleged tailoring of the administrative record (Petition p. 22) is similarly frivolous. Even petitioner admits that the USDA had in its files at the time the amended regulations were promulgated formulae for soups representing over 90 per cent of all consumer packaged soups sold. What petitioner ignores is the fact that the USDA recognized from its own experience over the years that most dehydrated soup mixes contain substantially below 2 per cent poultry meat on a ready-to-serve basis. (R. 187.) The 2 per cent meat content standard on a ready-to-serve basis appeared in the USDA regulations as early as 1959,[24] and, as petitioner admits, the USDA had formulae for the under-2 per cent soups in its files at least until March 1963, when they became exempt from the PPIA. Finally, the Department had avail-

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[23] This revised specification was printed in full in the Addendum to Campbell's brief filed in the court of appeals.

[24] See pp. 4-5, *supra.*

able to it Doc. 59-2 (R. 516) when it promulgated the challenged amended regulations. This document, an analysis of 23 noodle soups including condensed and dehydrated versions, revealed widely varying meat content for dehydrated soups, ranging from far below 2 per cent to above 3 per cent on a ready-to-serve basis.

CONCLUSION

The petition for certiorari does not raise any substantial federal question worthy of review by this Court. In view of the long and continuing lack of effective regulation of the labeling of soup products containing poultry ingredients, and in view of the fact that two courts have considered petitioner's contentions and have found them without merit, Campbell respectfully suggests that further delay in implementation of the challenged amended regulations promulgated over 2½ years ago is unwarranted. Campbell respectfully submits, therefore, that the petition for certiorari should be denied.

Respectfully submitted,

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March, 1967

APPENDIX A

1. The pertinent provisions of the Poultry Products Inspection Act, 71 Stat. 441 (1957), *as amended,* 21 U.S.C. §§ 451-69 (1964), in addition to those provisions printed in the petition for certiorari, are as follows:

Sec. 4(e). The term "poultry product" means any poultry which has been slaughtered for human food from which the blood, feathers, feet, head, and viscera have been removed in accordance with rules and regulations promulgated by the Secretary, any edible part of poultry, or, unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients.

Sec. 13. Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given reasonable notice of the alleged violation and opportunity to present his views orally or in writing with regard to such contemplated proceeding. Nothing in this Act shall be construed as requiring the Secretary to report for criminal prosecution violations of this Act whenever he believes that the public interest will be adequately served and compliance with the Act obtained by a suitable written notice or warning.

Sec. 15 (a). The Secretary shall, by regulation and under such conditions as to sanitary standards, practices, and procedures as he may prescribe, exempt from specific provisions of this Act—

* * *

(3) for such period of time as the Secretary determines that it would be impracticable to provide inspection and the exemption will aid in the effective administration of this Act, any person engaged in the processing of poultry or poultry products for commerce

and the poultry or poultry products processed by such person: *Provided, however,* That no such exemption shall continue in effect on and after July 1, 1960. . . .

Sec. 22. [Pub. L. No. 85-172, § 22, 71 Stat. 449 (1957)] This Act shall take effect upon enactment, except that no person shall be subject to the provisions of this Act prior to January 1, 1959, unless such person after January 1, 1958, applies for and receives inspection for poultry or poultry products in accordance with the provisions of this Act and pursuant to regulations promulgated by the Secretary hereunder, in any establishment processing poultry or poultry products in commerce or in a designated major consuming area. Any person who voluntarily applies for and receives such inspection after January 1, 1958, shall be subject, on and after the date he commences to receive such inspection, to all of the provisions and penalties provided for in this Act with respect to all poultry or poultry products handled in the establishment for which such said application for inspection is made.

2. The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1964), in addition to the provisions printed in the petition for certiorari, are as follows:

Sec. 2. As used in this Act—

* * *

(c) Rule and rule making.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing.

"Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and adjudication.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after

consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

APPENDIX B

MIL-S-001049D (GL)
14 FEBRUARY 1966
USED IN LIEU OF
MIL-S-1049C
20 JUNE 1963

MILITARY SPECIFICATION

SOUP, DEHYDRATED CHICKEN-FLAVORED, WITH NOODLES

This limited coordination Military specification has been prepared by the U. S. Army Natick Labpratories based upon currently available technical information, but it has not been approved for promulgation as a coordinated revision of Military Specification MIL-S-1049C. It is subject to modification. However, pending the promulgation as a coordinated Military specification, it may be used in procurement.

1. SCOPE

1.1 This specification covers dehydrated chicken-flavored soup with noodles for use by the Armed Forces as an item of general issue and as a component of operational rations.

* * *

5.3 LABELING AND MARKING.

5.3.1 *Cans.* Cans shall be labeled in accordance with MIL-L-1497 and as follows:

SOUP, DEHYDRATED
CHICKEN-FLAVORED, WITH NOODLES
————————net weight

This product is gas packaged in accordance with the provision of the applicable specification under which it is manufactured. If can is bulged, contact a Veterinary Officer, if available; if not, a Medical Officer to render a decision as to whether product is usable.

In addition, directions for use specified in 5.3.1.1 or 5.3.1.2, as applicable, shall be included in the labeling.

5.3.1.1 *For 401 by 411 can:*

Directions for use

25 servings (1 cup each):
Add contents of can to
6½ quarts of boiling
water and simmer for
7 minutes.

5.3.1.2 *For 603 by 700 cans:*

Directions for use

100 servings (1 cup each):
Add contents of can to
6½ gallons of boiling
water and simmer for
7 minutes.

5.3.2 *Shipping containers.* Shipping containers shall be marked in accordance with MIL-STD-129.

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Supreme Court of the United States

OCTOBER TERM 1966

No. 1078

THE BORDEN COMPANY, A NEW JERSEY CORPORATION,
Petitioner,

vs.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, UNITED STATES OF AMERICA, S. R. SMITH, ADMINISTRATOR, AGRICULTURAL MARKETING SERVICES, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA, AND G. R. GRANGE, DEPUTY ADMINISTRATOR, AGRICULTURAL MARKETING SERVICES, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Respondents,

and

CAMPBELL SOUP COMPANY, A NEW JERSEY CORPORATION,
Intervenor-Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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Respondents,

and

CAMPBELL SOUP COMPANY, A NEW JERSEY CORPORATION,
Intervenor-Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

The briefs in opposition—apart from some rather basic misstatements of fact—serve to demonstrate the importance of the issues presented, not only with respect to USDA but the administrative process generally.

(1) Denial of Any Hearing on Judicial Review.

In *Houston,* where "an elaborate trial on the merits was held," this Court specifically held that a USDA regulation of this type can only be sustained on the basis of substantial evidence *supporting the finding that the proscribed labels are deceptive*—and not merely, as here, "evidence" that food standards are desirable as a general matter.

The Government, however, contends (p. 6) that the *Houston* holding is inapplicable here on the extraordinary ground that it has somehow been overruled by the Administrative Procedure Act.

Surely, if there is any one thing absolutely clear about the APA, it is that Congress was seeking to *broaden* judicial review rather than *reduce* it. This was pointed out by this Court in *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474, 484, 487 (1951), in which the Court held that the APA expressed a "mood" of "dissatisfaction with too restricted application of the 'substantial evidence' test" and with reviewing courts' willingness to accept agency decisions based on surmise. The Court also admonished (p. 487) that "As legislation that mood must be respected . . . ." The Government's present attempt to circumvent *Houston* on the basis of the APA is in direct conflict with that admonition and with this Court's interpretation of the APA. If anything, the APA has strengthened the *Houston* rule.

Furthermore, when Congress enacted the Administrative Act, it recognized that a judicial hearing was essential where the agency, as here, had decided factual issues with-

out providing a meaningful hearing at the administrative level.*

In any event, when regulations are based on findings of fact, the regulations inherently lack a "rational foundation" if the underlying findings of fact are unsupported by evidence of a substantial character. See *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 224 (1943), and *N. L. R. B.* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 299 (1939).

It is instructive that Campbell seeks to distinguish *Morgan* v. *United States,* 304 U. S. 1 (1938), and *Jordan* v. *American Eagle Fire Ins. Co.,* 169 F. 2d 281 (D. C. Cir. 1948), on the ground they "involve ratemaking which traditionally has always required a trial-type hearing" (p. 19) and "in which a trial-type hearing *at some level* must be afforded to parties whose rates are fixed" (p. 20, emphasis added). Surely, as the *Houston* decision shows, no lesser standard should apply to a regulation which Cir. 1948), on the ground they "involve ratemaking which categorically prohibits—on pain of criminal punishment—a long-established tradename as "false and deceptive." Compare *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123 (1951).

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* Referring to Section 10(e)(b)(6), the House Report on the Bill states the governing principle:

> ". . . where a *rule* or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court."

Committee on Judiciary, H. R. Rep. 1980, 79th Cong., 2d Sess. (1946) (emphasis added). The Senate Report is to the same effect. Committee on Judiciary, S. Rep. 752, 79th Cong., 1st Sess. (1945).

(2) Denial of Any Hearing on the Accardi Issue.

The Government does not retract its admission in the Court below that it was the Secretary—not the Deputy Administrator—who actually made the decision. Instead, the Government (p. 9) contends that inquiry on the *Accardi* issue is foreclosed because the regulations were accompanied by a statement that the Deputy Administrator had personally examined the record. Plainly, however, under *Accardi* it is completely immaterial if the subordinate (to whom the decision-making has been delegated) personally examined the record. The question instead is whether the subordinate's decision was dictated by his superiors despite the delegation.

Campbell's response is equally without merit. In defense of the regulations which it drafted and succeeded in having promulgated, Campbell seeks to distinguish the *Accardi* decision, and to justify the denial of any hearing on the issue, on the ground that "The present case involves, not adjudication, but general policy rulemaking" (p. 16). According to Campbell (p. 17): "whatever evidence plaintiff might have offered in the district court about interference by Mr. Grange's superiors in the promulgation of the challenged regulations was totally irrelevant and immaterial."

But the *Accardi* decision affords no support for the notion that the due process principle enunciated there is limited to proceedings which an agency has labeled "adjudicatory," rather than "rule-making." Under fundamental constitutional principles, the question is the impact on the affected parties, not the label chosen by the agency. See *Greene* v. *McElroy,* 360 U. S. 474, 496-497 (1959). Campbell's argument "has regard to the mere form of the proceeding and ignores realities." *Morgan* v. *United States,* 304 U. S. 1, 20 (1938). For example, *Mor-*

gan involved "legislative" agency action, and *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123 (1951), involved "executive" agency action. Yet, in both those cases, "the government agency involved in each was found by the Court to have made determinations in the nature of adjudications affecting legal rights." *Hannah* v. *Larche,* 363 U. S. 420, 451-452 (1960).

(3) Denial of Any Opportunity to Rebut Confidential Evidence Relied Upon by USDA.

In seeking to justify the denial to petitioner of any opportunity—either on the administrative level or on judicial review—to rebut the confidential evidence relied upon by USDA in making the underlying findings of fact, the Government goes so far as to assert a prerogative to keep the evidence secret. According to the Government (p. 8), "Since rule-making was involved, the Secretary was not obliged to furnish petitioner with documents upon which he relied."

As already pointed out, the label which an agency chooses to give a proceeding is by no means controlling. For example, although the determination challenged in the *Joint Anti-Facist* case, *supra,* was supposedly "executive" in character, one of the reasons why this Court set it aside was because of the failure of the agency to afford the petitioners an opportunity to meet confidential evidence which it had relied on. See, *e. g.,* 341 U. S. at 170, 171-172 (concurring opinion).

If, as the Government suggests, the decision below is based on the ground that injured parties are not entitled to fundamental procedural protections in a proceeding of this type, it is in clear conflict with this Court's decisions and the need for review by this Court is apparent.

(4) The Tailored "Administrative Record".

The Government asserts (p. 8) that the District Court made an "*in camera* examination of the entire administrative file". *This is completely untrue.* Indeed, Campbell in its brief (pp. 21-22) seeks to justify some of the omissions. And it is precisely because of USDA's refusal to submit to the Court "the entire administrative file"—and its action in submitting only those *parts* of the file that it found to its liking and deleting dozens* of other relevant documents—that petitioner has objected to the "pick and choose" nature of the USDA compilation.** It is indisputable that the so-called "administrative record" filed in this case does not constitute "the whole record" as the Administrative Procedure Act specifically requires.

Other factual assertions by the Government are likewise erroneous. For example, the Government (p. 10) relies on "the testimony of the Special Assistant to the President". *There was no such testimony;* presumably the reference is to a letter (R. 540) which USDA refused to disclose on the ground it was "confidential" (R. 370-372).***

While relying on non-existent testimony, the Government blandly ignores the testimony of the Deputy Administrator that the survey referred to by the Government (p. 5) and Campbell (p. 12) does *not* support the regula-

* Campbell, it should be noted, discusses only the two examples of omitted documents which are specifically mentioned in the Petition for Certiorari (pp. 21-22).

** Furthermore, "*in camera* examination" would in no event constitute proper judicial review of agency findings. The only documents examined *in camera* by the District Court were a few documents which USDA claimed to be privileged and which are not in issue here.

*** The letter, in any event, merely supported in general terms the desirability of establishing food standards.

tions which he issued.* Both the Government and Campbell have also seen fit to ignore the testimony of Hermon Miller, the Director of USDA's Poultry Division and the official who personally supervised the development of these regulations. Mr. Miller testified that the required percentage "was pretty arbitrary"; that "we picked this figure out of the air . . ."; that USDA did not "have any concrete evidence" that the prohibited tradenames are misleading; that "false and deceptive is something we are not positive on because that is something that is not tested"; and that "I don't know that I could say that it is deceptive to the consumer . . ." (R. 114, 205, 126, 116).

Conclusion.

It is respectfully submitted that the petition for certiorari should be granted.

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* Grange Deposition, p. 113.